No. 97-992

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In The

Supreme Court of the United States

October Term 1997

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., DAVID AITKEN, JON BARAGA, CRAIG ELEY, JACK HAWKINS, LONNIE HAYNES, ALDEN KAUTZ, and BILL ORR, and WILLIAM DAVID ORR

Petitioners,

v.

NATALIE MEYER, Individually, and as Secretary of State for the State of Colorado,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Petition for a Writ of Certiorari

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101 pp.

QUESTIONS PRESENTED

Whether the Tenth Circuit Court of Appeals correctly determined that:

1. Colorado statute § 1-40-112(1), C.R.S. does not violate the First and Fourteenth Amendment rights of Petitioners by prohibiting persons under the age of 18 from circulating initiative and referendum petitions under threat of prosecution.

2. Colorado statute § 1-40-108, C.R.S. does not violate the First and Fourteenth Amendment rights of Petitioners by restricting the petition circulation period to no more than 6 months from the time the title is set.

3. The Colorado General Assembly's attachment of a "safety clause" to legislation and to Colorado SB 93-135, a statement which precludes any petition for a referendum on that bill, did not violate Petitioners' free speech, petition, political association and peaceably petition the Government for redress of grievance rights, which are protected under the First and Fourteenth Amendments to the United States Constitution.

Petitioners' questions presented by Petitioner Bill Orr:

4. Does First Amendment's "right to peaceably petition the government for redress of grievances" incorporate the initiative/referendum process? If so, do federal citizens enjoy strict scrutiny protection as it relates to this enumerated First Amendment right?

5. Is the level of protection afforded the right to peaceably petition the government for redress of grievances a fundamental expression of self-government deserving a higher level of protection than ballot access situations?

PARTIES TO THE PROCEEDING

1. AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., DAVID AITKEN, JON BARAGA, CRAIG ELEY, JACK HAWKINS, LONNIE HAYNES, ALDEN KAUTZ, WILLIAM DAVID ORR (Counsel of record, Neil D. O'Toole and PAUL GRANT, *Pro hac vice*)

2. BILL ORR, INDIVIDUALLY (appearing *pro se*)

3. NATALIE MEYER (replaced by VICTORIA BUCKLEY), Individually, and as Secretary of State for the State of Colorado (appearing by State of Colorado Attorney General)

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 5

A. History of the Colorado Initiative and Referendum 5

B. Nature of the Case, the Court of Proceedings, andDisposition of the Case Below 6

C. Statement on Colorado SB 93-135 (§ 1-40-101, *et seq.*, C.R.S.(as amended 1993) 7

D. Parties 8

E. The Proper Legal Standard To Be Applied Differs Between Circuits 9

Reasons for Granting the Writ 10

I. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings In *Meyer v. Grant*, 414 U.S. 414, 108 S. Ct. 1886 (1988) 10

II. The Petition Should Be Granted Because Initiative And Referendum Petitions Effectuate The Fundamental Right to Redress of Grievances (Petitioners Through Bill Orr).....13

III. The Petition Should Be Granted Because The Fundamental Right To Petition Is Entitled To Greater Protection Than Candidate Ballot Access Petition.....15

IV. The Petition Should Be Granted Because Prohibiting Persons Under The Age Of 18 To Circulate Petitions Is An Unconstitutional Denial Of Rights To Free Speech, Political Association, And Petitioning.....17

V. The Petition Should Be Granted Because Restricting Petition Circulators To A Six Month Petitioning Period Reduces Protected Political Expression, Serves No Compelling State Interest, And Violates ACLF's First And Fourteenth Amendment Rights.....19

VI. The Petition Should Be Granted Because The Legislative Use Of The "Safety Clause" To Suppress Referenda Is Unconstitutional.....20

A. The Use Of The "Safety Clause" Thwarts The Right To Petition For Redress Of Grievances 20

B. The Right Of Referendum Is A Reserved Unenumerated Ninth Amendment Right And Protection Against State Abridgment Under The Fourteenth Amendment By Original Reservation. (Petitioners by Bill Orr).....21

Conclusion..... 26

TABLE OF AUTHORITIES

Cases

American Constitutional Law Foundation et al v. Meyer, 120 F.3d 1092 (10th Cir. 1997) 1
ACLF et al. v. Meyer (93 M 1274) 1
Anderson v. Celebrezze, 460 U.S. 780, 787-88 16
Bullock v. Carter, 405 U.S. 134, 142-43 (1972) 16
Burdick v. Tankushi, 504 U.S. 428, 433 (1992) 16
Calder v. Bull, 3 U.S. 386 (1789) 17
City of Eastlake v. Forest City Enterprises, 96 S. Ct. 2358, 2361-2362 (1976) 21, 22
Colorado Project-Common Cause v. Anderson, 495 P.2d 220 (Colo. 1972) 5
Delgado v. Smith, 861 F.2d 1489, 1497-1498, (11th Cir. 1988) 9, 10
Diaz v. Board of County Com'rs of Dade County, 502 F.Supp 190 (S.D. Fla. 1980) 9
First National Bank of Boston v. Bellotti, 435 U.S. 765, 790-791, 98 S. Ct. 1407 (1978) 15, 18
Griswold v. Connecticut, 381 U.S. 479, 493 (1965) 22
In re. Gault, 587 U.S. 1, 13 (1967) 12
Marbury v. Madison, 1 Cranch 137 ..... 22, 23, 24
Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886 (1988) 11, 12, 13, 15
Montero v. Meyer, 861 F.2d 606, 697 (10th Cir. 1988) ... 17
Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273 23
New Progressive Party v. Hernandez Colon, 779 F. Supp. 646, 658-659 (1991) 10
Police Department of Chicago v. Mosley, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972) 26
Savings and Loan Association v. Topeka, 87 U.S. 686, 22 L. Ed. 455 (1895) 17
State v. Sullivan, 224 S.W. 327, 337 (Mo. 1920) 25
U.S. v. Cruikshank, et al., 92 U.S. 542, 551 (1876) ..16, 17
Van Kleek v. Ramer, 62 Colo. 4, 156 P. 1108 (1916) 14

Statutes

8 S. Ct. 297, 123 U.S. 661 24
28 U.S.C. 1254(1) 1
COLO. CONST. art II, sec. 1 & 2 22
COLO. CONST. art. V sec. 1 & 6 ..... 2, 6, 7
Colo. Const. art. V, sec. 1 ..... 2, 5
Colorado SB 93-135 ..... 6, 7, 8, 9, 21
Supreme Court Rule 29.6 8
U.S. CONST. amend. I 1, 2, 6, 10, 11, 12, 13, 21, 26
U.S. CONST. amend. IX 21, 22
U.S. CONST. amend. XIV 2, 6, 11, 26
U.S. CONST. amend. XXVII 20
U.S. CONST., Declaration of Independence. 13, 14
§1-40-101, et seq., C.R.S. 7
§1-40-106 C.R.S. 10
§1-40-108, C.R.S. 4, ... 19
§1-40-112(1), C.R.S. 4
§1-40-130, C.R.S. 18, 19
§18-1-801, C.R.S. 18
§19-2-102 and 104, C.R.S. 18
§31-11-105(1), C.R.S. (previously §1-40-127(1), C.R.S.) 26

Other Authorities

English Bill of Rights (1689) 17
Genesis 1:27 17

APPENDIX

Appendix A -- Opinion of the Tenth Circuit Court of Appeals in *ACLF v. Meyer*, 120 F.3d 1091 (10th Cir. 1997) (Decided 7/28/97) 1a

Appendix B -- Order of the United States Court of Appeals (10th Cir.) September 8, 1997 ..... 31a

Appendix C -- Judgment and Memorandum Opinion of United States District Court for the District of Colorado Filed November 23, 1994 (93 M 1467) 32a

Appendix D -- SB 93-135 (amending § 1-40-101, *et seq.*, C.R.S.)(challenged portions) 57a

Appendix E -- § 18-1-801, C.R.S. (criminal accountability) § 19-2-102, 104, C.R.S. (juvenile justice)..... 57a

Appendix F -- Letter Dated 5/17/93 Denying Referendum Based on Safety Clause 66a

Petitioners, American Constitutional Law Foundation, Inc., David Aken, Jon Baraga, Craig Eley, Jack Hawkins, Lonnie Haynes, Alden Kautz, and Bill Orr and William David Orr, respectfully request that a *writ of certiorari* be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit as reported at 120 F.3d 1092 (10th Cir. 1997). The opinion of the district court in *ACLF et al. v. Meyer* (93 M 1274) is attached as Appendix C.

STATEMENT OF JURI SDICTION

The judgment of the United State s Court of Appeals for the Tenth Circuit ("Court of Appeals" was entered on July 28, 1997. Appendix A. The Court of Appeals issued its mandate following a timely request for rehearing on September 8, 1997. Appendix B.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

ARTICLE I

Freedom of religion, speech and press - right of petition. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

ARTICLE XIV

§ 1. Citizenship defined - privileges of citizens. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. The Colorado Constitution article V, section 1 provides in relevant part:

ARTICLE V

Legislative Department

Section 1. General assembly - initiative and referendum. (1) The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly. . . .

. . .

(3) The second power hereby reserved is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health, or safety, and appropriations for the support and maintenance of the departments of state and state institutions, against any act or item, section, or part of any act of the general assembly, either by a petition signed by registered electors in an amount equal to at least five percent of the total number of votes case for all candidates for the office of the secretary of state at the previous general election or by the general assembly. Referendum petitions, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly that passed the bill on which the referendum is demanded. The filing of a referendum petition against any item, section, or part of any act shall not delay

the remainder of the act from becoming operative. . . .

. . .

(6) The petition shall consist of sheets having such general form printed or written at the top thereof as shall be designated or prescribed by the secretary of state; such petition shall be signed by registered electors in their own proper persons only, to which shall be attached the residence address of such person and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached an affidavit of some registered elector that each signature thereon is the signature of the person whose name it purports to be and that, to the best of the knowledge and belief of the affiant, each of the persons signing said petition was, at the time of signing, a registered elector. Such petition so verified shall be prima facie evidence that the signatures thereon are genuine and true and that the persons signing the same are registered electors.

4. Colorado statute §1-40-112(1), C.R.S. provides in relevant part:

§1-40-112. Circulators - requirements. (1) No section of a petition for any initiative or referendum measure shall be circulated by any person who is not a registered elector and at least eighteen years of age at the time the section is circulated.

5. Colorado statute §1-40-108, C.R.S. provides in relevant part:

§1-40-108. Petition - time of filing. (1) No petition for any ballot issue shall be of any effect unless filed with the secretary of

state within six months from the date that the titles, submission clause, and summary have been fixed and determined pursuant to the provisions of sections 1-40-106 and 1-40-107 and unless filed with the secretary of state within the time required by the state constitution before the election at which it is to be voted upon. A petition for ballot issue for the election to be held in November on odd-numbered years shall be filed with the secretary of state within the same time before such odd-year election as is required by the state constitution for issues to be voted on at the general election. All filings under this section must be made by 3 p.m. on the day of filing.

STATEMENT OF THE CASE

A. HISTORY OF THE COLORADO INITIATIVE AND REFERENDUM

Under the Colorado Constitution all political power derives from the people, who reserve to themselves the power to propose laws and amendments through the initiative process. They also reserve the referendum power to challenge legislative enactments. Colorado Constitution article V, section 1; see also *Colorado Project-Common Cause v. Anderson*, 495 P.2d 220 (Colo. 1972). Both the initiative and referendum processes are retained as a means of addressing grievances.

The people of Colorado reserved the initiative and referendum powers by a constitutional amendment in 1910. The "direct self government" involved in the petitioning process assures that only measures with a significant measure of popular support, as evidenced by a certain minimum number of qualified signatures on a petition, are placed on the ballot. The signature requirement has been viewed as a reasonable means of determining which issues are sufficiently important to submit to popular vote. Petitioners agree, for purposes of this case only, that the 5% signature requirement is an effective barrier to a potentially cluttered or confusing

ballot and serves as a reasonable manner in which to justify presentation of the petition to the public for consideration.

The initiative and referendum in Colorado are part of the legislative process, and are co-equal and legislative-direct, as opposed to legislative-representative. Colorado Constitution article V is titled "Legislative Department." Its first section begins, "Section 1. General Assembly - initiative and referendum." By the assignment of some legislative powers to the General Assembly, with the reservation of other powers to the people independent of the General Assembly, both the legislature and the people are given at least equal importance.

B. NATURE OF THE CASE, THE COURSE OF PROCEEDINGS, AND DISPOSITION OF THE CASE BELOW.

This action challenged Colorado's restrictions on the referendum and initiative process as violative of the free speech, petition, and political association rights of Petitioners under the First and Fourteenth Amendments.

Petitioners commenced this action in July, 1993, alleging that Respondent Colorado Secretary of State, who is charged with the duty of enforcing Colorado's regulations and restrictions on the initiative and referendum process, had violated Petitioners' First and Fourteenth Amendment rights.

Following a court trial between June 27 and 29, 1994, Judge Matsch ruled that the Colorado statute which prohibited circulation of petitions by persons under 18 years of age and non-registered voters was constitutional ; and that the attachment of the "safety clause" to Colorado SB 93-135 was a non-reviewable legislative action.[1] His ruling on "registered

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[1]Judge Matsch denied a preliminary injunction on July 19, 1993 on the "safety clause" issue. This denial was appealed to the Tenth Circuit Court, Case No. 93-1467, which upheld the lower court's opinion

circulators" was reversed, while those on the "safety clause" and eighteen-year-olds was upheld by the Tenth Circuit.

Judge Matsch also agreed with Petitioners that certain disclosure and circulator badge requirements of § 1-40-101, *et seq.*, C.R.S. constituted unconstitutional restrictions on "core political speech." Appendix C. These rulings were upheld by the Tenth Circuit United States Court of Appeals. Appendix A.

Both the Tenth Circuit and the trial court agreed that limits of a six-month period for initiative petition circulation was constitutional.

Respondent sought rehearing at the Tenth Circuit on the rulings which found the registered circulator, reporting and badge requirements unconstitutional. This was denied on September 8, 1997.

C. STATEMENT ON COLORADO SB 93-135 (§ 1-40-101, ET SEQ., C.R.S. (AS AMENDED 1993)

In 1993, the Colorado General Assembly passed SB 93-135 into law, with the Governor's signature (challenged portions of this law are attached as Appendix D). It imposed restrictions on the citizen referendum and initiative process through § 1-40-101, *et seq.*, C.R.S.

Petitioners sought to invoke the referendum process to submit Colorado SB 93-135 to a vote of the people. However, Respondent Meyer notified Petitioners that the referendum was not permitted, because SB 93-135 had attached to it a legislative statement that a bill is "necessary for the immediate preservation of the public peace, health, and safety," *i.e.*, a "safety clause". Art. V, sec. 1(3), of the Colorado Constitution provides that the legislative attachment

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on August 10, 1993. *Pro se* Plaintiff Orr appealed this denial to the United States Supreme Court, on September 8, 1993, which denied relief.

of the "safety clause" to an act suspends the right of referendum on that act. Appendix E. Because of this, petitioners were unable to exercise their referendum reserved right to challenge Colorado SB 93-135. Appendix F.

Colorado SB 93-135, consistent with its predecessors, prohibited individuals who were not registered voters, and who were under the age of 18 from circulating petitions. This prohibition on the circulation of petitions by non-registered voters is likewise found in Art. V, sec. 1(6) of the Colorado Constitution. *Id.*

Colorado SB 93-135 also expanded with the reporting requirements and the restrictions on circulation by requiring that petition circulators identify themselves, using badges. It also imposed on paid circulators numerous disclosure requirements. These changes are not found in the Colorado Constitution.

D. PARTIES

Petitioners are a public interest group/individuals who were supporters of the referendum on Colorado SB 93-135. They are all actively involved in the initiative and referendum process.

David Aitken was the chairman of the Colorado Libertarian Party and a proponent of a referendum on Colorado SB 93-135. Jon Baraga has been the state coordinator for the Colorado Hemp Initiative. Jack Hawkins worked in support of statewide petitions known as the Colorado Safe Workplace Initiative and Worker's Choice of Care. William David Orr was a minor desirous of circulating petitions in school voucher matters. (He has now reached the age of majority.) *Pro se* Appellant Bill Orr is a qualified elector, but not a registered voter, who sought to circulate petitions. American Constitutional Law Foundation ("ACLF") is a non-profit, public interest organization supportive of the processes of initiative, referendum, and recall. It has no parent company or subsidiary. Supreme Court Rule 29.6.

Petitioners sought to oppose Colorado SB 93-135 by referring this measure to a popular vote. This would have suspended its operation pending the election. Appendix C. They were precluded from this peaceable process of redress of grievances by Respondent Meyer, due to the "safety clause" attached to Colorado SB 93-135.

As a matter of routine administrative procedure, the Colorado General Assembly has for many years attached the "safety clause" to all bills which would otherwise be subject to referendum. The Colorado General Assembly does not offer any state interest, compelling or otherwise, for this routine suppression of the political speech embodied in referenda. There was no compelling state interest offered for prohibiting a referendum on Colorado SB 93-135.

William David Orr was prohibited from circulating petitions because he was not yet 18 and he was not a registered voter. Bill Orr was prohibited from circulating petitions because he was not a registered voter.

Petitioners asserted that six-month petitioning period found in Colorado SB 93-135 was too short for effective communication with the public to determine if there is adequate support for placing a measure on the ballot. Petitioner Jon Baraga, a proponent of the Colorado Hemp Initiative, experienced this because of the all volunteer nature of his circulators. His initiative lacked resources to hire paid circulators.

E. THE PROPER LEGAL STANDARD TO BE APPLIED DIFFERS BETWEEN CIRCUITS.

The Eleventh Circuit recognizes the right to petition for "redress of grievances" as the **root** of the referendum process. *Delgado v. Smith*, 861 F.2d 1489, 1497-1498, (11th Cir. 1988); *Diaz v. Board of County Com'rs of Dade County*, 502 F.Supp 190 (S.D. Fla. 1980):

> Citizens have the ***unquestioned right to petition their government for redress of*** what they believe are grievances . . . ***One***

> ***means*** of preserving this right is through the procedures of initiative, ***referendum*** and recall.
>
> . . .
>
> [Initiative] petitions represent the exercise by individuals of their fundamental rights to express themselves ***freely*** and ***to petition the government for redress of grievances***.

Delgado v. Smith, *supra*, at 1497 (emphasis); see also *New Progressive Party v. Hernandez Colon*, 779 F. Supp. 646, 658-659 (1991).

The Tenth Circuit, on the other hand, characterizes the exercise as a ballot access matter, where a flexible First Amendment standard is applied.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULING IN *MEYER V. GRANT*, 414 U.S. 414, 108 S. CT. 1886 (1988)

In 1988, this Court was called upon to rule on the constitutionality of Colorado's statutory limitation on the circulation of petitions by paid circulators. The proponents had submitted a petition to amend the Colorado Constitution to remove motor carriers from the jurisdiction of Colorado's Public Utilities Commission. Due to the proponents' own experience as petition circulators, they had concluded that they would need paid personnel to obtain the required number of signatures within the allotted time to be on the ballot. At that juncture, Colorado prohibited the circulation of petitions by paid circulators under Colorado's statute § 1-40-106 C.R.S. (effective 1984). The proponents sought declaratory relief to

United States Constitution in Federal Court, District of Colorado. Their requested relief was denied.

Thereafter, the matter proceeded to the Tenth Circuit which reversed the trial court, holding that the paid circulator prohibitions were unconstitutionally violative of the First Amendment.

Certiorari was granted and the case was argued before this Court on April 25, 1988 in *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886 (1988). In *Meyer*, as it has in this case, Colorado argued that since the power of initiative is a state-created right, it is free to impose limitations on the exercise of that right. This Court rejected this argument, stating:

> We agree with the Court of Appeals' conclusion that the statute trenches upon an area in which the importance of First Amendment protections is "at its zenith." For that reason the burden that Colorado must overcome to justify this criminal law [violation of the paid circulator proscription] is well-nigh insurmountable.

Id. at 1894.

This Court determined that Colorado's asserted interest in protecting the integrity of the initiative process did not justify the paid circulator provision because it had failed to show that it was necessary to burden the proponents' ability to communicate their message. *Id.*

This Court held:

> The Colorado statute prohibiting the payment of petition circulators imposes a burden on political expression that the state has failed to justify. The Court of Appeals correctly held that the statute violates the First and Fourteenth Amendments. Its judgment is therefore affirmed.

Id. 1895.

Although the Tenth Circuit, in the decision below, applied this Court's ruling in *Meyer* to strike Colorado's prohibition on the circulation of petitions by registered electors, it upheld the limitation imposed on the circulation of petitions by individuals below the age of 18.

The Tenth Circuit recognized that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re. Gault*, 587 U.S. 1, 13 (1967). It nevertheless determined that the age restriction was permissible because age restrictions on voting, a fundamental right, are recognized as a "proxy for maturity" and the plaintiffs had not "demonstrated that persons under 18 have a stronger interest in circulating than they do in voting."

Nowhere in its decision did the Tenth Circuit address the First Amendment right of individuals under 18 to participate in core political speech where the protections of the First Amendment are at their zenith. Further, the court did not recognize that the peaceful process for petitioning for redress of grievances is a citizen right which can be equally effectuated by those under the age of 18 through the process of political discussion which accompanies petition circulation.

Additionally, the Tenth Circuit upheld Colorado's limitations on the petition circulation period, the circulator affidavit provisions and the Colorado General Assembly's attachment of a safety clause which precluded the challenged 1993 law from being subject to referendum. Each of these placed severe restrictions on the quantum of political speech and the process through which this political speech can be effectuated. Each of these Colorado statutes have the same effect as the paid petition circulator provisions which were found unconstitutional in *Meyer*. Each "limits the number of voices who will convey appellees' message in the hours they can speak and, therefore, limits the size of the audience they can reach." *Id.* 1892. Further, each of these provisions "makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus

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limiting their ability to make the matter the focus of statewide discussion." *Id.*

In sum, the Tenth Circuit limited the ruling in *Meyer* by failing to apply exacting scrutiny to the political speech and redress of grievances aspects of the petition process. As such, the decision is violative of the teachings in *Meyer* and of the United States Constitution.

II.

THE PETITION SHOULD BE GRANTED BECAUSE INITIATIVE AND REFERENDUM PETITIONS EFFECTUATE THE FUNDAMENTAL RIGHT TO REDRESS GRIEVANCES. (Petitioners through Bill Orr).

The right to peaceably petition the government for redress of grievances is a fundamental exercise of sovereignty, and additionally represents a "safety valve" in difficult times. Therefore, it can never be scrutinized by a "flexible standard."

Unlike free speech alone, the right to petition is targeted specifically at ***peacefully resolving a harm*** caused by government. The initiative and referendum petitions effectuate this fundamental right.

Distinct from other First Amendment rights, when petitioning the government for redress of grievances -- despite the nature of intensity of the harm inflicted or created by government, or the conduct of government officials -- protection is accorded only when the exercise is ***peaceable***, the only petition clause:

History in general, and American history in particular, demonstrates that the abuse or frustration of the peaceful exercise by government - the very object of the petition -- to be most imprudent. Such abuse not only aggravates public trust, but in volatile times invites rebellion.

> In every stage of these oppressions we have petitioned for redress in the most humble terms:

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> Our repeated petitions have been answered only by repeated injury.

U.S. Constitution, Declaration of Independence.

In Colorado the initiative and referendum process was adopted in 1910 after a long period of governmental abuse and mistrust, a period when citizens felt betrayed by their representative form of government.

> At the beginning of the agitation for this reform, there was a popular belief among the people that by the strictly representative plan of expressing the popular will, the people were too frequently misrepresented and often betrayed. . . .

Van Kleek v. Ramer, 62 Colo. 4, 156 P. 1108 (1916).

In the years after, Colorado's initiative and referendum petitions clearly reflect the redress nature the petition exercise, where the government was the source of the grievance. For example, adopted petitions included: recall of elected officials (1912); repealing state-wide prohibition, subject to national repeal (1932); reapportionment of the General Assembly (1962); limitations concerning the tenure, removal and retirement of state justices (1966); limitations on State Assembly (1966); prohibiting levying of taxes, etc. for purpose of furthering the 1976 Winter Olympic Games (1972); limitations on annexation, absent voter approval (1974); limitations on state legislature retarding binding vote caucuses, and measures referred to committee/floor (1988); limitations on terms of elected officials (1990); limitations on new taxes that may be levied, absent voter approval (1992).

In each of these petitions, the government either was the ***source*** of the grievance or otherwise failed to take appropriate action to mitigate the grievance. The difficult task of undertaking each of the above initiative and referendum petitions typically occurred only after petitions and other effort directed to the legislative body had failed.

Thus, the initiative and referendum petitions are the same as a legislatively-directed petition for redress of grievances, except the grant of relief (*e.g.*, redress) is made directly by the sovereign people, as opposed to indirectly by a legislative body (whose powers are derived only from the sovereign people).

In this context, the initiative and referendum petition is no more than a modern-day extension of the right to peaceably petition the government for redress of grievances, and is entitled the same strict scrutiny protection as political speech.

III.

THE FUNDAMENTAL RIGHT TO PETITION IS ENTITLED TO GREATER PROTECTION THAN CANDIDATE BALLOT ACCESS PETITION. (Petitioners through Bill Orr.)

Petitioners do not argue the state does not have an interest in regulating the balloting process of those elections where initiative or referendum petitions have been qualified. Nor do they dispute the state's interest in preventing ballot fraud. However, the concern of circulator fraud is minimal in the petition process. "[T]he risk of fraud or corruption, or the appearance thereof, is more remote at the petition state of an initiative than at the time of balloting." cf. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790, 98 S. Ct. 1407 (1978)("The risk of corruption perceived in candidate elections . . . simply is not present in a popular vote on a public issue.") ('The risk of corruption . . . simply is not present . . . on a public issue'). *Meyer v. Grant, supra,* 1985 (emphasis).

Petitioners do not dispute the state's interest in requiring a modicum of public support exist prior to a petition being placed upon the ballot. Nor do Petitioners dispute the state's interest in assuring the petitions' ballot title be fair and accurate so as not to mislead voters.

Finally, Petitioners do not dispute the state's interest in receiving a petition three months prior to an election so it can be orderly placed upon the ballot.

Rather, Petitioners assert that the initiative and referendum petitions are rooted in the process of redressing grievances, with election balloting merely being the forum in which the sovereign citizens adopt or reject the petition.

The fact that grievances of a petition are redressed at the ballot box, directly by the sovereign, as opposed to indirectly by a legislative body whose powers are derived from the sovereign, does not diminish the level of First Amendment protection accorded the exercise.

But the Tenth Circuit mistakenly relies upon candidacy petition precedent. See *e.g. Burdick v. Tankushi*, 504 U.S. 428, 433 (1992).

It is submitted the Tenth Circuit's reliance is misguided. Candidacy petitions are not constitutional safety values for the redress of grievances. Rather, they are ballot access petitions because candidacy rights are derived from the powers of the state. The candidate's derived rights are not fundamental. A candidate has no constitutional right to run for office. *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972).

Thus, a candidate's petition is not calculated to redress a grievance caused by government. It is merely a vehicle to obtain ballot status. In such cases, the state may impose restrictions it deems appropriate to protect the voters' interests. *Anderson v. Celebrezze*, 460 U.S. 780, 787-88. But it may not where fundamental constitutional rights are concerned.

In stark contrast to a candidate's ballot access petition, the constitutional redress of grievances petition effectuated by, and at the core of, the initiative and referendum exercise is fundamental to our sovereignty. It existed long before the existence of our country or constitution.

> The right of the people peaceably to assemble [and to petition] for lawful purposes existed long before the adoption of the Constitution of the United States . . . The government of the United States when established found it in existence, with the obligation on the part of the

> States to afford it protection. As no direct power over it was granted.

U.S. v. Cruikshank, et al., 92 U.S. 542, 551 (1876) (emphasis).

Thus, the constitutional right to petition for redress of grievances is not derived from the Constitution, it is merely protected by it. See *Calder v. Bull*, 3 U.S. 386 (1789); *Savings and Loan Association v. Topeka*, 87 U.S. 686, 22 L. Ed. 455 (1895). It is respectfully submitted this fundamental sovereign right is a moral right of self government, originating from our Creator. ("So God created man in his own image" with free agency, Genesis 1:27.) From the beginning, man's original nature was the ability to choose and govern for himself.

Thus, Petitioners' root "safety valve" constitutional petition exercise ***is not derived from***, not is it secured in any way ***by the right to vote***. It pre-existed the right to vote, and its very exercise, in fact, secured both freedom of speech and the right to vote. See English Bill of Rights (1689).

Thus, the circulation and "signing of an initiated petition is not 'voting'...." *Montero v. Meyer*, 861 F.2d 606, 697 (10th Cir. 1988).

In sum, every aspect of the initiative and referendum petition, except ministerial details and the state's interest in maintaining an orderly, non-fraudulent ballot, requires strict scrutiny.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE PROHIBITING PERSONS UNDER THE AGE OF 18 TO CIRCULATE PETITIONS IS AN UNCONSTITUTIONAL DENIAL OF RIGHTS TO FREE SPEECH, POLITICAL ASSOCIATION, AND PETITIONING.

The prohibition against circulation by individuals under the age of 18 totally eliminates their core political speech in the petition circulation process.

Colorado acknowledges that it "is undisputed that the circulators advocate on behalf of a proposed measure." Colorado's Answer and Opening Brief in the Tenth Circuit p. 24. Yet it asserts an interest of assuring that only mature, responsible petition circulators capable of explaining the petition and capable of understanding and complying with petition regulations to support the prohibition on circulation by individuals under 18 years of age.

This position ignores the fact that the "risk of corruption perceived in cases involving candidates' elections . . . simply is not present in a popular vote on a public issue." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-791, 98 S. Ct. 1407 (1978). The merits of the petition initiative are for the public to determine.

§1-40-130, C.R.S. imposes criminal penalties for fraud occurring during the circulation of petitions. Appendix D.

Colorado's statutes provide for criminal accountability for individuals between 10 and 18 years of age:

> **Insufficient age.** The responsibility of a person for his conduct is the same for persons between the ages of 10 and 18 as it is for persons over 18 except to the extent that responsibility is modified by the provisions of the Colorado Children's Code, Title 19, C.R.S. No child under 10 years of age shall be found guilty of any offense.

§18-1-801, C.R.S. Appendix E.

Further, minors in Colorado under the age of 18 are subject to prosecution through the Colorado Children's Code, §§19-2-102 and 104, C.R.S. for all violations of Colorado statutes and are punished criminally through that Code.

Appendix F. Thus, the integrity of the circulation process is more than adequately protected by Colorado's existing statutory scheme.

As this Court recognized in the circulation of petitions involves "core political speech." Further, the message found in the petition is subject to the scrutiny of the entire electorate. This ensures the validity of the petition process which, in turn, ensures the integrity of our democracy. Precluding individuals under 18 from collecting petition signatures does nothing to further these interests. Rather, it unjustifiably reduces the quantum of political speech while eliminating entirely those under eighteen from participation in the political speech which accompanies the petition circulation process. It also eliminates their ability to petition their government for what they believe to be grievances germane to their age (e.g. public school education reforms).

V.

THE PETITION SHOULD BE GRANTED BECAUSE RESTRICTING PETITION CIRCULATORS TO A SIX MONTH PETITIONING PERIOD REDUCES PROTECTED POLITICAL EXPRESSION, SERVES NO COMPELLING STATE INTEREST, AND VIOLATES ACLF'S FIRST AND FOURTEENTH AMENDMENT RIGHTS.

The Tenth Circuit and the trial court found that the six-month restriction on the quantity of political speech found in the petition circulation provisions (§1-40-108, C.R.S. Appendix D) serves to ensure an orderly ballot. No argument was advanced as to why this could not as well be accomplished if petitions were circulated for 8 months, 9 months, or 1 year.

An orderly ballot can be assured by requiring a petition be submitted far enough in advance of an election so that it can be reviewed, challenged if appropriate, and properly placed on the ballot. If six months is simply a matter of administrative

convenience, why must this convenience be served on the back of the First Amendment?

The trial court observed that many groups had successfully placed initiated measures on the ballot under existing rules. However, there was also ample testimony that many had failed because of the short time frame.

The trial court acknowledged that the initiative circulation process in Colorado has become a business. Initiatives that succeed today have been circulated by paid petitioners. What this indicates is that *Colorado's regulations* - especially the short petition circulation period - *are so burdensome that "all-volunteer" efforts are doomed to failure* for lack of support, but does lack of time to identify that support. The question of adequate voter support is addressed by a minimum signature requirement, not by the speed at which signatures can be gathered. The question of adequate voter support to merit ballot placement is not addressed by limiting the time in which those voters can be sought out. The state has advanced no interest to justify such a burden on speech.

It might be suggested that a "reasonable" restriction on time of circulation, should affect the "timeliness" of a petition. But what time constraint would be required for a petition to remain timely if where the grievance is continuing and unredressed. Afterall, states themselves took 200 years to ratify the Twenty-Seventh Amendment to the U.S. Constitution.

VI.

THE PETITION SHOULD BE GRANTED BECAUSE THE LEGISLATIVE USE OF THE "SAFETY CLAUSE" TO SUPPRESS REFERENDA IS UNCONSTITUTIONAL.

A. THE USE OF THE "SAFETY CLAUSE" THWARTS THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES.

The people of Colorado created the initiative and referendum process in 1910 through a constitutional amendment. In that amendment, an exception to the power of referendum was made for "laws necessary for the immediate preservation of the public peace, health or safety." As the district court found, the Colorado General Assembly has, as it did here, routinely used this exception to avoid review of legislation by referendum by adopting a "safety clause" in each enactment. Appendix B, p. 16. The record here establishes that the "safety clause" was attached to Colorado SB 93-135 without any discussion.

The people of Colorado have chosen a mixed form of government, part representative democracy through elected representatives, part direct democracy through initiative and referendum. While it is their sovereign right to choose their form of government, they must implement that government in a manner consistent with the U.S. Constitution and the laws of the land.

B. THE RIGHT OF REFERENDUM IS A RESERVED UNENUMERATED NINTH AMENDMENT RIGHT AND IS PROTECTED AGAINST STATE ABRIDGMENT UNDER THE FOURTEENTH AMENDMENT BY ORIGINAL RESERVATION. (Petitioners by Bill Orr)

The Legislature's routine attachment of the "Safety Clause" to its legislation, absent a compelling reason, solely for the purposes of preventing Petitioners' referendum petitions is violative of Petitioners' First and Ninth Amendment rights.

Federal citizens in Colorado by ***reserving*** unto themselves the right of initiative/referenda in 1910 specifically *retained* a fundamental unenumerated right of "self-government."

> Under our constitutional assumption, all power derives from the people, who can delegate it to representative instruments which they create. In establishing

> legislative bodies, the ***people can reserve*** to ***themselves power*** to ***deal directly with matters*** which might ***otherwise*** be ***assigned*** to the ***legislature***.

City of Eastlake v. Forest City Enterprises, 96 S. Ct. 2358, 2361-2362 (1976) (emphasis added).

This organic theory is reflected in the Colorado Constitution:

> The people of this state have the sole and exclusive right of governing themselves . . . and to alter and abolish their constitution and form of government whenever they may deem it necessary. . . .

Colorado Constitution article II, section 2 ; see also *id.* sec. 1 ("All political power is vested in and derived from the people; all government is founded upon their will only . . . .")

Thus, the initiative/***referendum*** is a sovereign reservation of highest order, and an ***unenumerated*** right protected against state abridgment under the Ninth and Fourteenth Amendments. *Griswold v. Connecticut,* 381 U.S. 479, 493 (1965).

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or to disparage others ***retained*** by the people.

U.S. Constitution amendment IX (emphasis added).

Petitioners respectfully submit the Legislature's indiscriminate and continuous use of the "safety clause" merely to prevent their referendum petitions on its legislation is the equivalent of a prior restraint.

Judicial review is required because Petitioners' injuries are continuing and painfully absent any means of redress. This is contrary to *Marbury v. Madison*, 1 Cranch 137.

> It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 BL Com. 109

Id. p. 147.

Marbury v. Madison is instructive because it deals with the duty of the federal courts to examine underlying facts and to determine when certain fundamental rights vested. The *Marbury* court was able to distinguish as to those activities respecting fundamental rights and those involving the proper prerogative of an independent branch of government. The court held that absent its judicial review there would be a loss of fundamental rights. Id. 162, 163.

Importantly, to the vestment of Plaintiff's instant right of referendum, the *Marbury* court concluded the vestment of fundamental rights was a judicial question.

> [W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy . . . The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority.

Id. 166 (emphasis added).

The *Marbury* court recognized its ***duty*** was implicit to the court's very existence, as the sovereign people were the supreme law-making authority, and it was upon their will, alone, as expressed in the Constitution, to which the courts were bound. *Id.* 175, 176, 177.

Perhaps most instructive is this *Marbury* principle found in *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, which practically mandates "judicial examination" of the "safety clause."

> There are, of necessity, limits beyond which legislation cannot rightfully to . . . the courts ***must*** obey the constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. "To what purpose," it was said in *Marbury v. Madison* [cite omitted] "are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation" ***The Courts are not bound*** by mere forms, nor are they to be misled ***by mere pretenses***. ***They are*** at liberty -- indeed, are ***under a solemn duty to look at*** the ***substance*** of ***things***, whenever they enter upon the inquiry ***whether*** the ***Legislature*** has ***transcended*** the limits of its ***authority***. If, therefore, a ***statute, purporting*** to have been enacted ***to protect*** the ***public health***, the public morals, or the ***public safety***, has no real or substantial relation to those objects, or ***is a palpable invasion of the rights secured by the fundamental law, it is the duty of the courts to so adjudge***, and thereby give effect to the Constitution.

Id. 8 S. Ct. 297, 123 U.S. 661 (emphasis added).

This federal principle has been applied in review of the "Safety Clause."

> [S]ome Courts, viewing the "peace and safety" clause . . . have ruled that, if the lawmaking body declared that the measure was for the "immediate preservation of the peace, health, or safety," such legislative declaration

> was binding upon the courts and a finality. To the rule in this line of cases ***we do not agree***. The very substance of a constitutional right could be taken from the people by an overanxious and hostile legislative body. The right here involved is not only constitutional, but one of vital importance and of large proportions. If the courts cannot view the whole measure, and from it determine whether or not the lawmakers overstepped the constitutional restrictions in denying the referendum of the measure by their ukase on the subject of "immediate preservation of peace, health, or safety" then the constitutional referendums become a farce. It becomes a legislative referendum, rather than a constitutional referendum, because by a mere false declaration as to "peace, health or safety" every measure could be precluded from the constitutional referendum."

State v. Sullivan, 224 S.W. 327, 337 (Mo. 1920) (emphasis added).

Thus, the Colorado Legislature's use of the "safety clause" must be reviewed under a strict scrutiny standard.

No state constitutional amendment can suspend the operation of the U.S. Constitution. If utilizing the "safety clause" to suspend the referendum reduces "core political speech," then its use is unconstitutional without the demonstration of a compelling state interest which passes strict scrutiny.

Where, as here, proponents of a referendum on a legislative enactment are prevented by the "safety clause" from placing the matter on the ballot, their political speech has been thwarted. This is a form of legislative prior restraint on political speech. The legislature by being given the power to attach the "safety clause" is impermissibly involved in deciding when, and if, this particular form of speech will be allowed.

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.

Police Department of Chicago v. Mosley, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972).

True emergency exceptions can be upheld under a strict scrutiny standard of review without impermissibly violating separation of power constraints. However, no such emergency existed here.

Even the Colorado General Assembly recognizes that the attachment of a "safety clause" can be used to thwart the fundamental right of referendum in Colorado. Thus, for city or town ordinance petitions Colorado does not allow a "safety clause" attachment to suspend a referendum, unless the legislative body "states in a separate section why it is thus necessary and unless it receives the affirmative vote of three-fourths of all the members elected to the legislative body. . . ." §31-11-105(1), C.R.S. (previously §1-40-127(1), C.R.S.).

The use of the "safety clause" here must be found unconstitutional

CONCLUSION

Colorado's restriction on initiative and referendum processes are incompatible with First and Fourteenth Amendment protections, because they violate the fundamental enumerated right to petition for redress of grievances protected by the First Amendment and must be subjected to strict scrutiny. The following provisions/conduct cannot withstand this test:

1. Prohibit persons who are not yet 18 years of age from circulating petitions;

2. Restrict the petitioning time period on initiatives to only six months;

3. Require petition circulators to sign vague, incomprehensible affidavits under threat of criminal liability; and

4. Impose a legislative bar to the referendum process, through routine attachment of the "safety clause". Only a compelling state interest could justify such legislative interference with protected political expression, expression dealing with the very process of self-government.

Consequently, *certiorari* should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 94-1576

FILED
United States Court of Appeals
Tenth Circuit

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Clerk

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG C. ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; BILL ORR, individually and as the Parent and Guardian of WILLIAM DAVID ORR,

Plaintiffs-Appellants,

v.

NATALIE MEYER, individually and as Secretary of State for the State of Colorado; DOUGLAS BROWN, individually and as Director of Legislative Legal Services for the State of Colorado,

Defendants-Appellees.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG C. ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; WILLIAM DAVID ORR; BILL ORR, individually and as the Parent and Guardian of William David Orr,

Plaintiffs-Appellees,

v. No. 94-1581

NATALIE MEYER, individually and as Secretary of State for the State of Colorado; DOUGLAS BROWN, individually and as Director of Legislative Legal Services for the State of Colorado,

Defendants-Appellants.

Appeal from United States District Court
for the District of Colorado
(D.C. No. 93-M-1467)

Neil D. O'Toole, of Dallas, Holland, & O'Toole, P.C., Denver, Colorado, for the plaintiffs.

Bill Orr, pro se, Denver, Colorado.

Maurice G. Knaizer, Deputy Attorney General (Gale A. Norton, Attorney General, with him on the brief), Denver, Colorado, for the defendants.

Before BRISCOE, SETH[1], and LUCERO, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiffs brought this 42 U.S.C. 1983 action challenging portions of Senate Bill 93-135, which regulates Colorado's initiative and referendum petition process. Plaintiffs argued S.B. 93-135 imposed restrictions that violated their rights under the First, Ninth,and Fourteenth Amendments to the United States Constitution. Plaintiffs appeal thedistrict court's decision to uphold portions of S.B. 93-135, and defendants appeal the court's decision to strike down portions of S.B. 93-135. We agree with the district court's decision in all regards, except for its ruling upholding

[1] The late Honorable Oliver Seth, United States Senior Circuit Judge, heard oral argument in this case but did not participate in the final decision. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in resolving the appeal. United States v. Wiles, 106 F.3d 1516 (10th Cir. 1997).

the requirement set forth in C.R.S.A. 1-40-112(1) that the circulator be a registered elector. We affirm in part and reverse in part.

I.

Colorado allows its citizens to place issues on the ballot by petition. Colo. Const. art. V, 1(1). The petition process consists of the initiative and the referendum. Colo. Const. art. V, 1(2) & (3). A referendum is unavailable with respect to laws "necessary for the immediate preservation of the public peace, health, or safety." Colo. Const. art. V, 1(3). Under the Colorado system, the general assembly has exclusive authority to determine whether a law is "necessary for the immediate preservation of the public peace, health, or safety." Van Kleeck v. Ramer, 156 P. 1108, 1110 (Colo. 1916). Thus, when the general assembly attaches a "safety clause" to a law, a referendum on the law is precluded, although the right of initiative remains. See Cavanaugh v. Dept. of Social Services, 644 P.2d 1, 4 n.6 (Colo. 1982).

The Colorado Constitution grants the general assembly the authority to adopt legislation "designed to prevent fraud, mistake, or other abuses" in the petition process. Committee for Better Health Care v. Meyer, 830 P.2d 884, 893 (Colo. 1992) (en banc) (citing Colo. Const. art. V, 1(2), which provides petitions shall be filed "in such form as may be prescribed pursuant to law," and Colo. Const. art. VII, 11, which grants general authority to regulate elections and elective franchise). The manner in which petitions may be circulated and by whom, and how they may be signed and by whom are regulated by C.R.S.A. 1-40-101 et seq. (West Supp. 1996). Senate Bill 93-135 rearranged and amended the article to "properly safeguard, protect, and preserve inviolate"

the people's initiative and referendum power. C.R.S.A. 1-40-101.

Prior to circulation, proponents of a ballot issue must submit a draft petition to the directors of the legislative council and the office of legal services for review and comment. C.R.S.A. 1-40-105(1). A public hearing is held within two weeks of submission. Id. Following the hearing, the draft is presented to the title board, which prepares a title, submission clause, and summary. C.R.S.A. 1-40-106. The proponents then have six months to file the petition with the Secretary of State. C.R.S.A. 1-40-108(1). Unless the petition contains the number of signatures required by the Colorado Constitution, it is of no effect when filed. C.R.S.A. 1-40-109(1).

Petition circulators collect the signatures and sign affidavits in which they aver, among other things, that each signer was a registered elector and was not paid to sign the petition. C.R.S.A. 1-40-111(2). Circulators assume personal responsibility to prevent irregularities in the process. Loonan v. Woodley, 882 P.2d 1380, 1388 (Colo. 1994) (en banc). If any circulator is found to have violated any provision of the article, the section of the petition circulated by that person "shall be deemed void." C.R.S.A. 1-40-132(1).

Plaintiff American Constitutional Law Foundation, Inc., is a non-profit, public-interest organization that supports direct democracy. The remaining plaintiffs are various individuals who, with the exception of William David Orr (a minor who desires to circulate petitions regarding educational vouchers) and Bill Orr (a qualified but unregistered elector), regularly participate in the petition process as proponents and circulators. At the time of trial, Jon Baraga was circulating

the Colorado Hemp Initiative and was also the statewide petition coordinator for the Hemp Initiative.

Along with several other plaintiffs, including American Constitutional Law Foundation, Baraga sought to repeal S.B. 93-135 by referendum. Plaintiffs had agreed to devote their resources in a joint effort, but the Secretary of State informed them by letter that a referendum on S.B. 93-135 was precluded because it contained a safety clause.

Plaintiffs brought suit claiming various portions of Article 40 violated the First and Fourteenth Amendments by restricting circulation to six months, requiring all circulators to sign an affidavit, restricting the right to circulate by age and voter registration, requiring all circulators to wear identification badges, requiring proponents to disclose the names of all paid circulators and the amounts they were paid, and attaching a safety clause to S.B. 93-135. They also asserted vagueness and Ninth Amendment claims. The court struck down the badge requirement and portions of the disclosure requirement after concluding they unduly burdened the First and Fourteenth Amendments. The court rejected plaintiffs' remaining claims.

II.

We turn to plaintiffs' First Amendment issues. Plaintiffs argue the manner in which Colorado regulates the petition process is subject to exacting scrutiny because it significantly burdens political speech. They rely heavily on Meyer v. Grant, 486 U.S. 414 (1988), in which proponents challenged a Colorado law making it unlawful to pay any consideration for the circulation of initiative or referendum petitions. Meyer acknowledged "circulation of a petition involves the type of interactive communication concerning

political change that is appropriately described as 'core political speech.'" Id. at 421-22. The Court applied exacting scrutiny to strike down the challenged law, concluding it restricted political expression by limiting the number of voices conveying the proponents' message and making it less likely the proponents would gather the required number of signatures to place their issue on the ballot. Id. at 422-23.

Plaintiffs reason that because S.B. 93-135 restricts the manner in which citizens may circulate petitions, the instant case is indistinguishable from Meyer. They also cite Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981), First Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978), and Buckley v. Valeo, 424 U.S. 1 (1976), as controlling authority. Each case, including Meyer, involved restrictions on expenditures to disseminate information on political issues. No such restrictions are involved here.

A successful petition results in a question being submitted to the voters. Thus, the petition process is a ballot access vehicle, as well as an avenue for political expression. Unlike plaintiffs, we do not read Meyer to require that Colorado maintain a petition process that, in essence, allows unregulated access to the ballot. Indeed, such a reading would conflict with the general rule that states have the power to regulate their elections and access to their ballots. See, e.g., Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1366 (1997) ("States may enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."); Storer v. Brown, 415 U.S. 724, 730 (1974) (recognizing need for substantial regulation of elections if they are to be fair, honest, and orderly). Cf. Tashjian v. Republican Party of Connecticut, 479 U.S. 208,

217 (1986) (explaining "the Constitution grants to the States a broad power to prescribe the 'Times, Places, and Manner of holding Elections for Senators and Representatives,' Art. I, 4, cl. 1, which power is matched by state control over the election process for state offices").

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." Burdick v. Takushi, 504 U.S. 428, 433 (1992). The Supreme Court has upheld "generally-applicable and evenhanded restrictions that protect the integrity of the electoral process itself." Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983). At least one other circuit has extended similar deference to regulations governing initiative petitions. See Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291, 297 (6th Cir. 1993) (applying a more relaxed standard to "nondiscriminatory, content-neutral limitations on the [people's] ability to initiate legislation"); cf. Biddulph v. Mortham, 89 F.3d 1491, 1501 n.10 (11th Cir. 1996) (finding balancing of state interest against voter burden used in candidate-access cases not needed in initiative-access cases in upholding state initiative regulations against challenges of non-discriminatory burdensomeness). Colorado has a strong interest in ensuring both candidate elections and ballot issues are run fairly, efficiently, and honestly. See Timmons, 117 S. Ct. at 1367 ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes.").

To subject every petition regulation to exacting scrutiny would tie Colorado's hands in seeking to assure equitable and efficient elections on ballot issues. Timmons discussed a flexible standard for evaluating the constitutionality of laws regulating the electoral process:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, this Court must weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

117 S. Ct. at 1366 (internal citations omitted). Thus, the rigorousness of our inquiry depends upon the extent to which the challenged law burdens plaintiffs' First and Fourteenth Amendment rights.

Plaintiffs challenge five restrictions--(1) the C.R.S.A. 1-40-108(1) requirement that proponents file a petition with the secretary of state within six months of the date that the titles, submission clause, and summary have been fixed; (2) the C.R.S.A. 1-40-111(2) requirement that circulators sign affidavits averring, essentially, that they have complied with Colorado law; (3) the C.R.S.A. 1-40-112(1) restriction allowing petitions to be circulated only by registered electors at least eighteen years old; (4) the C.R.S.A. 1-40-112(2) requirement that all circulators wear badges identifying themselves by name and as either paid or volunteer; and (5) the C.R.S.A. 1-40-112(1) and (2) disclosure requirement regarding paid circulators.

C.R.S.A. 1-40-108(1) provides, in part, that "[n]o petition for any ballot issue shall be of any effect unless filed with the secretary of state within six months from the date that the title, submission clause, and summary have been fixed and determined." The gist of plaintiffs' argument is that the six-month limit is arbitrary and excludes some measures from being placed on the ballot. Defendants argue the deadline is necessary to preserve an orderly ballot and, in any case, is not as onerous as other limits approved by the Supreme Court, cf. American Party of Texas v. White, 415 U.S. 767, 786-87 (1974) (upholding Texas law allowing access to ballot if minor party candidate files petition within 55 days of general primary election).

The six-month deadline is a neutral ballot access regulation. By definition, ballot access restrictions prevent some measures from being placed on the ballot. However, this feature is insufficient by itself to require strict scrutiny. Cf. Burdick, 504 U.S. at 433 (noting "the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny'"). The court found, and the record indicates, that by planning and proper preparation of the ballot, title proponents enjoy ample time to circulate petitions.

Although some measures might fare better under a longer or indeterminate period, the current deadline is not a significant burden on the ability of organized proponents to place a measure on the ballot. "[T]he State's asserted regulatory interests [need only be] 'sufficiently weighty to justify the limitation' imposed on the [Plaintiffs'] rights." Timmons, 117 S. Ct. at 1366. Our inquiry does not require "[e]laborate, empirical verification of weightiness" of the State's asserted justifications. Id. Defendants assert

several interests: preserving the integrity of the state's elections, maintaining an orderly ballot, and limiting voter confusion. The regulation here advances these interests by establishing a reasonable window in which proponents must demonstrate support for their causes. The six-month deadline is a reasonable, nondiscriminatory ballot access regulation; it does not offend the First and Fourteenth Amendments.

C.R.S.A. 1-40-111(2) requires circulators to sign specifically described affidavits and is "generally-applicable" (Celebrezze, 460 U.S. 788 n.9). It provides:

> To each petition section shall be attached a signed, notarized, and dated affidavit executed by the registered elector who circulated the petition section, which shall include his or her printed name, the address at which he or she resides, including the street name and number, the city or town, the county, and the date he or she signed the affidavit; that he or she has read and understands the laws governing the circulation of petitions; that he or she was a registered elector at the time the section of the petition was circulated and signed by the listed electors; that he or she circulated the section of the petition; that each signature thereon was affixed in the circulator's presence; that each signature thereon is the signature of the person whose name it purports to be; that to the best of the circulator's knowledge and belief each of the persons signing the petition section was, at the time of signing, a registered elector; and that he or she has not paid or will not in the future pay and that he or she believes that no

> other person has paid or will pay, directly or indirectly, any money or other thing of value to any signer for the purpose of inducing or causing such signer to affix his or her signature to the petition. The secretary of state shall not accept for filing any section of a petition that does not have attached thereto the notarized affidavit required by this section. Any signature added to a section of a petition after the affidavit has been executed shall be invalid.

Section 1-40-111(2) is rooted in the Colorado Constitution, which requires circulators to sign affidavits averring that the signatures collected are valid. Colo. Const. art. V, 1(6). Plaintiffs argue 1-40-111(2) is unduly burdensome and unconstitutionally vague. We address their vagueness argument in part III of this opinion. There is little, if anything, in the record to support plaintiffs' claim that the affidavit requirement[1] significantly burdens political expression by decreasing the pool of available circulators. Hence, exacting scrutiny is not required.

A state has a strong, often compelling, interest in preserving the integrity of its electoral system. See Timmons, 117 S. Ct. at 1366. Circulators play an important role in ballot issue elections--they are solely responsible for gathering the number and type of signatures required to place an issue on the ballot. Indeed, as we have previously noted,

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[1] The late Honorable Oliver Seth, United States Senior Circuit Judge, heard oral argument in this case but did not participate in the final decision. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in resolving the appeal. United States v. Wiles, 106 F.3d 1516 (10th Cir. 1997).

circulators are, in effect, entrusted with personal responsibility to prevent irregularities in the petition process. See Loonan, 882 P.2d at 1388; Committee on Better Health Care, 830 P.2d at 894; C.R.S.A. 1-40-116(a). The affidavits "ensure that circulators, who possess various degrees of interest in a particular initiative, exercise special care to prevent mistake, fraud, or abuse in the process of obtaining thousands of signatures of only registered electors throughout the state." Loonan, 882 P.2d at 1388-89. Given the responsibility circulators bear in ensuring the integrity of elections involving ballot issues, and given the fact that the affidavit requirement is a reasonable, nondiscriminatory restriction, we conclude plaintiffs' challenge fails.

Section 1-40-112(1) prescribes who may circulate: "No section of a petition for any initiative or referendum measure shall be circulated by any person who is not a registered elector and at least eighteen years of age at the time the section is circulated." The district court held 1-40-112(1) was unreviewable because the petition process is not a right granted by the United States Constitution. In Meyer, we rejected that argument, explaining even though the initiative and referendum process is not guaranteed by the United States Constitution, Colorado's choice to reserve it does not leave the state free to condition its use by impermissible restraints on First Amendment activity. 828 F.2d at 1456. Cf. Taxpayers United for Assessment Cuts, 994 F.2d at 295 (concluding although federal Constitution does not require a state to create initiative procedure, if it does, it cannot impose restrictions that violate Constitution); Henry v. Connolly, 910 F.2d 1000, 1004 (1st Cir. 1990) (same). Furthermore, it is irrelevant that the statutory restriction is based upon a constitutional provision enacted by petition. The voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly may by enacting

legislation. Cf. Citizens Against Rent Control, 454 U.S. at 295.

Plaintiffs argue, essentially, that 1-40-112(1) is discriminatory. Under an equal protection analysis, classifications that impinge upon the exercise of a fundamental right are subject to the most exacting scrutiny. See, e.g., Clark v. Jeter, 486 U.S. 456, 461 (1988). Plaintiffs do not bring an equal protection claim; nevertheless, when a statute allows some people to speak but not others, the principles of equal protection and free speech are intertwined. Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure 2d 20.11, p. 48. Cf. Police Department of City of Chicago v. Mosley, 408 U.S. 92, 94-95 (1972).

The registration requirement has a discriminatory effect. It bars persons who are not registered voters from circulating petitions, thereby excluding that group of persons from participating in core political speech. See Meyer, 486 U.S. at 421-22. Colorado acknowledges there are at least 400,000 qualified but unregistered voters in the state. The mandatory exclusion of unregistered circulators also limits the number of voices to convey the proponent's message, limiting the audience the proponents can reach and making it less likely they will be able to gather the required number of signatures to place a measure on the ballot. Cf. Meyer, 486 U.S. at 422-23. Consequently, we apply exacting scrutiny.

Colorado fails to identify a compelling state interest to which its registration requirement is narrowly tailored. The state attempts to justify the registration requirement by arguing it has a compelling interest in ensuring circulators are residents so the regulatory system may be more easily policed (the secretary's authority to issue subpoenas to circulators

does not extend beyond Colorado's borders) and circulators who violate the law may be more easily prosecuted. Even if we assume the state's potentially compelling interest in preserving the integrity of its elections requires all circulators to be residents, a question we need not decide, the registration requirement is not narrowly tailored to ensure that circulators are residents. Clearly, a large number of Colorado residents are not registered voters. The state's asserted interest could be more precisely achieved by simply imposing a residency requirement for circulators. Because Colorado's requirement that circulators be registered voters is not narrowly tailored to a compelling state interest, we find it unconstitutionally impinges on free expression and reverse the district court.

Section 1-40-112(1) also places an age restriction on circulation. We are mindful that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In re Gault, 387 U.S. 1, 13 (1967). We also recognize, however, that age commonly is used as a proxy for maturity. See, e.g., U.S. Const. art I, 2, 2 (establishing age requirement for election to House of Representatives); 3, 3 (Senate); art. II, 1, 4 (President). Cf. U.S. Const. amend. XXVI (extending vote to eighteen-year-olds). Not surprisingly, Colorado places age restrictions on voting and candidacy. Colo. Const. art. 5, 4 (establishing age requirement for members of General Assembly); art. 7, 1 (establishing age requirement for voters). While candidacy is not a fundamental right, voting is. Cf. Burdick, 504 U.S. at 433 (voting); Bullock v. Carter, 405 U.S. 134, 142-43 (1972) (candidacy). Subject to the Twenty-sixth Amendment, it seems states generally may place an age requirement on the right to vote without having to satisfy exacting scrutiny. Cf. Hill v. Stone, 421 U.S. 289, 297 (1975) (examining challenge unrelated to age). Plaintiffs have not demonstrated that persons under eighteen have a stronger interest in circulating than they do in voting.

The age requirement is a neutral restriction that imposes only a temporary disability--it does not establish an absolute prohibition but merely postpones the opportunity to circulate. Exacting scrutiny is not required. Because maturity is reasonably related to Colorado's interest in preserving the integrity of ballot issue elections, plaintiffs' First Amendment challenge fails. Cf. Stiles v. Blunt, 912 F.2d 260, 267 (8th Cir. 1990) (maturity and life experience significant factors in setting minimum age for candidates), cert. denied 499 U.S. 919 (1991).

Section 1-40-112(2) requires each circulator to wear a personal identification badge:

> "(a) All circulators who are not to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "VOLUNTEER CIRCULATOR" in bold-faced type which is clearly legible and the circulator's name. (b) All circulators who are to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "PAID CIRCULATOR" in bold-faced type which is clearly legible, the circulator's name, and the name and telephone number of the individual employing the circulator.

A violation of 1-40-112(2) could result in the signatures collected by a circulator being declared void, C.R.S.A.1-40-132, and possibly even criminal prosecution, C.R.S.A. 1-40-130(2). The district court held that 1-40-112(2) infringes the right to anonymous political expression and struck it down in its entirety. The court found the badge requirement discourages people from circulating

because people are reluctant to wear badges, especially when they advocate unpopular causes.

Defendants attempt to avoid exacting scrutiny. First, they argue the badge requirement has been upheld by the Supreme Court, citing footnotes from Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781, 799 n.11 (1988), and Martin v. City of Struthers, 319 U.S. 141, 148 n.14 (1943). Riley invalidated a North Carolina law restricting the manner in which professional fundraisers could solicit charitable contributions, and Martin invalidated a city ordinance prohibiting knocking on the door or ringing the doorbell of any residence for the purpose of distributing literature. Neither case addressed a law similar to 1-40-112(2) and neither held that a state may condition political expression on the wearing of an identification badge. Further, the footnotes on which defendants rely are dicta. See, e.g. Riley, 487 U.S. at 803 (Scalia, J., concurring) (noting footnote 11 addresses situation not before Court).

Second, defendants argue exacting scrutiny is unwarranted because there is no constitutionally protected right to circulate anonymously. However, "[t]he First Amendment affords the broadest protection to . . . political expression in order '[t]o assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" Buckley, 424 U.S. at 14 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)). It is also clear that circulation is core political expression. Meyer, 486 U.S. at 421-22. The Supreme Court has protected anonymous political expression and association. See, e.g., McIntyre v. Ohio Elections Com'n, 115 S.Ct. 1511 (1995) (invalidating law restricting anonymous election-related hand billing); Talley v. California, 362 U.S. 60, 63 (1960) (invalidating law prohibiting distribution of "any handbill in

any place under any circumstances" unless it contains names and addresses of those who prepared, distributed, or sponsored it); Bates v. City of Little Rock, 361 U.S. 516 (1960) (striking down ordinance that organization disclose its membership list); NAACP v. Alabama, 357 U.S. 449 (1958) (overturning civil contempt for failing to disclose membership list). The Court protects anonymity because "fear of reprisal might deter perfectly peaceful discussions of public matters of importance." Talley, 362 U.S. at 65. As the Court has explained, our nation's tradition of anonymous political expression "is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation." McIntyre, 115 S.Ct. at 1517.

On the other hand, the Court also has upheld disclosure requirements that deprive some speakers of anonymity. Buckley, 424 U.S. at 60-84 (upholding disclosure requirements of Federal Election Campaign Act of 1971). Cf. First Nat. Bank of Boston, 435 U.S. at 792 n.32 (noting source of corporate political advertising may be required as means of disclosure). Although exhaustive, the disclosures examined in Buckley are not akin to the identification badges at issue here. The disclosures in Buckley were limited to candidate elections, were triggered only where the speaker spent money, and were further removed from the moment of speech. Even in Buckley, however, the Court acknowledged that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." Buckley, 424 U.S. at 64. Thus, the Court subjected the disclosure requirements to exacting scrutiny. Id. at 64-69. To the extent defendants attempt to avoid exacting scrutiny, their second argument is unpersuasive.

Third, defendants argue circulators have only a diminished interest in anonymity because they sign affidavits that are attached to the petition, which is available to the public. See 1-40-118(1). Information contained on an identification badge is much more accessible than information attached to a filed petition and, unlike the affidavit requirement, the badge requirement forces circulators to reveal their identities at the same time they deliver their political message. The badge requirement operates when the reaction to their message may be the most intense, emotional, and unreasoned. Thus, as opposed to the affidavit requirement, the badge requirement deprives circulators of their anonymity at the precise moment their interest in anonymity is greatest. The record amply supports the court's finding that the badge requirement chills circulation. It places a "severe" restriction on First and Fourteenth Amendment rights requiring exacting scrutiny.

Defendants argue the badge requirement serves a compelling interest, aiding the state's efforts to prevent fraud by enabling the public to identify individuals who make false or fraudulent statements while circulating. Thus, defendants essentially argue the badges enable the state to pursue more efficiently individuals who engage in misconduct. Although the state has a compelling interest in preserving the integrity of its elections (see, e.g., Eu v. San Francisco Democratic Com., 489 U.S. 214, 231 (1989)), "the First Amendment does not permit the State to sacrifice speech for efficiency" (Riley, 487 U.S. at 795). Additionally, "the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." Meyer, 486 U.S. at 427. Therefore, "[a]lthough the State has every right to take strong measures to prevent

. . . dishonest activities by petition circulators, the State may do so only by measures tailored to attack those problems within clearly recognized areas permitted by the Supreme Court." Grant, 828 F.2d at 1454.

Ohio claimed the same general interest in identifying individual instances of misconduct in McIntyre, 115 S.Ct. 1511. In McIntyre, the petitioner challenged an Ohio law prohibiting, among other things, distribution of any publication designed to promote the adoption or defeat of a ballot issue unless the publication contained the name of the person who was responsible for it. The purpose of the law was to identify persons who distributed materials containing false statements. The Court applied exacting scrutiny and invalidated the law because it was not narrowly tailored to serve Ohio's asserted interest in preventing fraud.

Circulating a petition is akin to distributing a handbill. In both instances, an individual identifies himself or herself with a specific viewpoint by personally disseminating it. Just as those who distribute handbills have a strong interest in remaining anonymous, so do circulators. As the Supreme Court has explained:

> Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation--and their ideas from suppression--at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences,

> and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

McIntyre, 115 S.Ct. at 1524 (internal citation omitted).

Defendants argue the badge requirement is the type of "limited identification requirement" McIntyre suggested might be constitutional. Defendants rely on Buckley, which upheld compelled disclosure of certain expenditures and their uses in candidate elections. Requiring circulators to identify themselves against their will is more intrusive than simply disclosing an expenditure. Whereas contributing to a campaign is only a generalized demonstration of support, circulating a petition, and the advocacy it entails, more clearly identifies the circulator with the precisely defined point of view he or she is personally encouraging others to support. Spending money to advance an unpopular viewpoint is a more detached form of support and is less likely to precipitate retaliation than circulating a petition. Cf. McIntyre, 115 S.Ct. at 1523 (distinguishing expenditure from distributing handbill).

As previously noted, defendants argue the badge requirement is necessary to enable the state to identify and punish fraud. Section 1-40-112(2) is not narrowly tailored to serve the state's asserted interest. Conditioning circulation upon wearing an identification badge is a broad intrusion, discouraging truthful, accurate speech by those unwilling to wear a badge, and applying regardless of the character or strength of an individual's interest in anonymity. Additionally, the badges are but one part of the state's comprehensive scheme to combat circulation fraud. Article 40 provides other tools that are much more narrowly tailored to serve the state's interest. See C.R.S.A. 1-40-130, 1-40-131 (criminalizing

certain conduct); 1-40-132 (authorizing secretary of state to void a petition). See also C.R.S.A. 1-40-110 (requiring every page to contain a warning to potential signers); 1-40-118 (providing for written protest). Although requiring circulators to wear identification badges may enhance the state's ability to impose other penalties, it does not follow, and it is unestablished, that the badges are a necessary component of the state's arsenal. Cf. Burson v. Freeman, 504 U.S. 191, 199 (1992) (explaining that "[t]o survive strict scrutiny . . . a State must do more than assert a compelling state interest--it must demonstrate that its law is necessary to serve the asserted interest").

Because we find the badge requirement unconstitutionally infringes on circulators' First Amendment rights by its identification requirements, and because plaintiffs' arguments and evidence focus entirely on this element of the badge requirement, we express no opinion regarding whether the additional requirements that the badge disclose whether the circulator is paid or a volunteer, and if paid, by whom, would pass constitutional muster standing alone.

Section 1-40-121 places disclosure requirements on paid circulators and is "generally-applicable" (Celebrezze, 460 U.S. 788 n.9). It provides as follows:

> (1) The proponents of the petition shall file with the official who receives filings under the "Campaign Reform Act of 1974", article 45 of this title, for the election the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition, the amount paid per signature, and the total amount paid to each circulator. The filing shall be made at the same

time the petition is filed with the secretary of state. Any payment made to circulators is an expenditure under article 45 of this title.
(2) The proponents of the petition shall sign and file monthly reports with the secretary of state, due ten days after the last day of each month in which petitions are circulated on behalf of the proponents by paid circulators. Monthly reports shall set forth the following:
(a) The names of the proponents;
(b) The name and the residential and business addresses of each of the paid circulators;
(c) The name of the proposed ballot measure for which petitions are being circulated by paid circulators; and (d) The amount of money paid and owed to each paid circulator for petition circulation during the month in question.

The court invalidated 1-40-121(1) to the extent it requires the proponents of a petition to provide "the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition" in reporting the amounts paid to circulators. The court invalidated 1-40-121(2) in its entirety. We apply exacting scrutiny. See Buckley, 424 U.S. at 64.

Section 1-40-121 is a broad disclosure provision. It compels disclosure of the name of a paid circulator regardless of the amount he or she received to circulate. The State analogizes 1-40-121 to the Federal Election Campaign Act of 1971 disclosure provision upheld in Buckley. Buckley acknowledged that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." Id. at 64. However, Buckley identified three interests "sufficiently important to

outweigh" the infringement on the "privacy of association and belief guaranteed by the First Amendment." Id. at 64. First, campaign finance disclosure informs voters of the candidate's place in the political spectrum and alerts them "to the interests to which a candidate is most likely to be responsive." Id. at 67. Second, "disclosure requirements deter actual corruption and avoid the appearance of corruption." Id. Third, "disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations." Id. at 68.

Unlike the statute in Buckley, 1-40-121 imposes no monetary threshold--a circulator must be identified by name and address regardless of whether he or she received 10 cents or $10,000. Cf. Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 93 (1982). The statutes at issue in Buckley and Brown are dissimilar from 1-40-121 for another reason--they regulate candidate elections but 1-40-121 does not. Cf. Brown, 459 U.S. at 89 n.2 and Buckley, 424 U.S. at 63 with C.R.S.A 1-40-121. Section 1-40-121 applies only to the circulation of initiative and referendum petitions. None of the three interests the Court found sufficient in Buckley are relevant here. The first and third are inapplicable because 1-40-121 addresses expenditures, not contributions. The second is inapplicable because "quid pro quo" concerns are not present here. Cf. Bellotti, 435 U.S. at 790 (explaining "[r]eferenda are held on issues, not on candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."). Defendants' attempts to analogize 1-40-121 to Buckley are unpersuasive.

Defendants argue 1-40-121 survives even exacting scrutiny because it is necessary to enable signers to determine whether there is "grassroots" support for a measure and to

discourage fraud. Neither 1-40-121(1) nor 1-40-121(2) is narrowly tailored to serve these interests.

The court struck down 1-40-121(1) to the extent it compels disclosure of information specific to each paid circulator. Much like requiring identification badges, compelling the disclosure of the identities of every paid circulator chills paid circulation, a constitutionally protected exercise. Although the fact that disclosure is made at the time the proponents file the petition lessens the burden of the disclosure, the law fails exacting scrutiny because the interests asserted by the state either already are or can be protected by less intrusive measures. Cf. Grant, 828 F.2d at 1452 (Colorado's ban on paid circulators failed exacting scrutiny because interests Colorado asserted either were or could be protected by less intrusive measures).

Defendants' first asserted interest, informing the electorate whether a measure has grassroots support, is directly and specifically protected by the constitutional requirement that to reach the ballot an initiative or referendum petition must be signed "by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election." Colo. Const. art. V, 1(2) & (3); C.R.S.A. 1-40-109(1). As limited by the court, 1-40-121(1) requires proponents to disclose the amount spent per signature and, thus, the total amount paid to circulators. To the extent the amount of money spent has some correlation to the level of grassroots support, this information allows voters to compare the level of support enjoyed by different issues. Requiring proponents to provide a detailed roster of all who were paid to circulate compromises the expressive rights of paid circulators, but sheds little light on the relative merit of the ballot issue.

Defendants' second asserted interest, discouraging fraud, also is protected by a battery of more narrowly tailored measures. See C.R.S.A. 1-40-130, -131 (criminalizing certain misconduct during circulation); 1-40-132 (authorizing secretary of state to void petition). See also C.R.S.A. 1-40-110 (requiring every page to contain warning to potential signers); 1-40-118 (providing for written protest). The State has made no showing that these mechanisms are inadequate. Cf. Colorado Republican Federal Campaign Committee v. Federal Election Com'n, 116 S. Ct. 2309, 2317 (1996). Defendants have not shown the disclosure is necessary to discourage fraud.

Section 1-40-121(2) compels detailed monthly disclosures. The court invalidated it in its entirety. Defendants assert the same two interests: grassroots support and fraud. Compelling detailed monthly disclosures while the petition is being circulated chills speech by forcing paid circulators to surrender the anonymity enjoyed by their volunteer counterparts. In that the disclosures are contemporaneous with circulation, 1-40-121(2) is more akin to the badge requirement than 1-40-121(1). Section 1-40-121(2) is a broad intrusion only loosely related to the interests it is purported to serve. Like 121(1), 121(2) fails exacting scrutiny because it is not narrowly tailored to serve either of defendants' asserted interests.

III.

Plaintiffs argue 1-40-111(2), which requires circulators to sign specifically described affidavits, is unconstitutionally vague. Failure to comply with 1-40-111(2) may result in criminal prosecution. C.R.S.A. 1-40-130(1). Plaintiffs' opening brief on appeal addresses only the chilling effect resulting from the threat of criminal prosecution.

Their reply brief, however, expands the discussion to include the civil penalty set forth in 1-40-132(1). Because their opening brief did not address the civil penalty, and because this argument does not appear to have been before the district court, we will not consider it.

In Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972), the Court explained, generally, as follows:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of (those) freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than if the

> boundaries of the forbidden areas were clearly marked.

Plaintiffs argue, essentially, that 1-40-111(2) is so difficult to understand that it inhibits circulation and, therefore, abuts upon political expression. They specifically attack the requirement that circulators "read and understand" the law governing circulation.

We must read the statute as it has been interpreted by Colorado's highest court. United States v. Gaudreau, 860 F.2d 357, 361 (10th Cir. 1988). In Loonan v. Wooley, 882 P.2d 1380 (Colo. 1994) (en banc), the Colorado Supreme Court considered and rejected a vagueness challenge directed at the "read and understand" requirement.

Plaintiffs argued, in part, that the requirement was vague because lay circulators had no way to determine whether their "understanding" was legally sufficient. Loonan dismissed their argument, explaining as follows:

> Under the statute, a circulator may be penalized only for signing the affidavit without "reasonably believing that the statements made in the affidavit are true." 1-40-130(1)(d). Understanding [the law governing circulation] . . . requires nothing more than that a circulator believe that he or she knows what a circulator can and cannot do. This prohibition would ensnare only those circulators who made no attempt to understand their duties. The "read and understand" language mandated in the circulator's affidavit accordingly provides fair notice of the prohibition because

> it accommodates the subjective belief of the circulator.
>
> 882 P.2d at 1390.

The vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). We are mindful of the special concerns that attach when a criminal law is alleged to impinge upon a First Amendment right. See, e.g., NAACP v. Button, 371 U.S. 415, 433 (1963); Gaudreau, 860 F.2d at 360. Nevertheless, in light of Loonan, we conclude the statute is sufficiently definite because it "explicitly endorses the lay circulator's own interpretation of 'understanding,'" Loonan, 882 P.2d at 1390, and does not, as plaintiffs seem to argue, invest law enforcement officers with sweeping, unrestrained discretion.

IV.

The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. Plaintiff Bill Orr, appearing pro se, argues the right to circulate initiative and referendum petitions is an unenumerated right protected by the Ninth Amendment. He implicitly argues it is incorporated in the Fourteenth Amendment. He points to no controlling authority in support. His argument is unpersuasive.

V.

The general assembly attached a safety clause to S.B. 93-135. Plaintiffs moved at pretrial to preliminarily enjoin S.B. 93-135, arguing the general assembly unconstitutionally attached the safety clause. The court denied the motion. We affirmed, explaining in part as follows: "Although the attachment of the safety clause to SB 93-135 precludes a referendum challenge, it does not unconstitutionally restrict plaintiffs' access to the ballot. Plaintiffs remain free, under the initiative power reserved to the people by the Colorado Constitution, art. V, 1(2), to propose any measure by petition." American Constitutional Law Foundation v. Meyer, 1994 WL 387872 *2. We remain convinced, for substantially the same reasons stated in our earlier order, that plaintiffs' arguments against the constitutionality of the safety clause are without merit.

AFFIRMED IN PART and REVERSED IN PART.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
No. 94-1576 & 94-1581

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG C. ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; BILL ORR, individually and as the Parent and Guardian of WILLIAM DAVID ORR,
Plaintiffs-Appellants/ Cross-Appellees,

v.

NATALIE MEYER, individually and as Secretary of State for the State of Colorado; DOUGLAS BROWN, individually and as Director of Legislative Legal Services for the State of Colorado,
Defendants-Appellees/ Cross-Appellants

ORDER Entered September 8, 1997 Before **BRISCOE** and **LUCERO**, Circuit Judges

This matter comes on for consideration of appellant's petition for rehearing and suggesiton for rehearing en banc.

Upon condiseration wherof, the petition for rehearing is denied by the panel that rendered that decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 93-M-1 467

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., DAVID AITKENS,ON BARAGA, CRAIG ELEY, JACK HAWKINS, LONNIE HAYNES, ALDEN KRAUTZ, BILL ORR, Individually and as the Parent and Guardian of WILLIAM DAVID ORR,

Plaintiff,

v.

NATALIE MEYER, individually, and as Secretary of State for the State of Colorado,

Defendant.

JUDGMENT

Pursuant to the memorandum opinion and order entered by Chief Judge Richard P. Matsch on November 23,1994, it is

ORDERED, ADJUDGED AND DECREED that the following provisions of the Colorado Revised Statutes are invalid because they are in violation of the First and Fourteenth Amendments to the United States Constitution, and the defendant Secretary of Colorado is permanently

enjoined from enforcing these provisions:

(Supp. 1994) to the extent that it requires the proponents of a petition referendum to provide "the name, address, and county of voter registration were paid to circulate any section of the petition" and the names of circulation amounts paid to circulators; C.R.S. § 1-40-121(2) (Supp. 1994) in its entirey 112(2) (Supp. 1994) in its entirety. It is

FURTHER ORDERED that all other claims of the plaintiffs are dismi awarded. The finality of this judgment shall not be affected by any applicatication for attorney's fees under 42 U.S.C. Sec 1988.

DATED: NOVEMBER 23, 1994

s/JAMES R. MANSPEAKER, CLERK

APPROVED:

s/Richard P. Matsch, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 93-M-1 467

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., DAVID AITKENS, ELEY, JACK HAWKINS, LONNIE HAYNES, ALDEN KRAUTZ, BILL ORR, ir Parent and Guardian of WILLIAM DAVID ORR,

Plaintiff,

v.

NATALIE MEYER, individually, and as Secretary of State for the State of C olorado

Defendant.

MEMORANDUM OPINION AND ORDER

MATSCH, Chief Judge

This is an action for declaratory and injunctive relief under 42
from restrictions regarding the circulation and submission of petitions to propose laws and constitutional amendments in the State of Colorado. The principal contention is that the challenged requirements restrict freedoms protected by the First and Fourteenth Amendments to the United States Constitution.

The plaintiff, American Constitutional Law Foundation, Inc., is a non-profit, public interestk organization supportive of this form of direct democracy. The individual plaintiffs, excepting William David Orr, have participated in the petitioning process. Jack Hawkins worked in support of petitions described as the Colorado's Safe Workplace Initiative and Worker's Choice of Care Jon Baraga has been the state coordinator for the Colorado Hemp initiave. William David Orr a minor, wants to circulate petitions. All of the plaintiffs have shown sufficient commitment to continuing efforts to address the Colorado electorate through petitions for the initiative and referendum to establish standing to bring this action and to make the issues justiciable within the jurisdiction provided by 28 U.S.C. § 1343. The legal questions have been presented within the context of an evidentiary record submitted in support of cross motions for summary judgment and at a trial to the court. There are no material factual disputes.

COLORADO LAW

The focus of the plaintiffs' pleadings is an act of the General Assembly of the State of Colorado identified as Senate Bill 93-135, amending and relocating provisions concerning the initiative and referendum in Article 40 of Title 1 of the Colorado Revised Statutes. In the pre-trial order, the plaintiffs summarized their claims that this legislation violates protections found in the First, Ninth and Fourteenth Amendments to the United States Constitution in the following ways:

A)Non-registered voter prohibition on petition circulation.
B)Prohibiting circulators under the age of 18 to circulate.
C)Restricting circulating petitions to an arbitrarily set time

period of six months.
D)Prohibiting circulation of petitions without badge identification
E) Mandating certain requirements for paid circulators.
F) The affidavit circulator provisions are vague so as to make competent compliance impossible.
G)The disclosure provisions on paid circulators are unconstutionally burdensome.

Pre-trial Order of June 1, 1994

Some of the provisions in S.B. 93-135 simply recodify the existing law in the Colorado and some repeat requirements in the Colorado Constitution. A brief historical review of the development of direct democracy in Colorado is necessary to achieve an appropriate on the plaintiffs' contentions.

In 1910, voters in Colorado approved an amendment to Section 1 of Article V of the Constitution of the State of Colorado, establishing the initiative and referendum. 1910 Colo Sess. Laws 11. The initial paragraph of that amendment provides the premise for this reservation of legislative power in these words:

> Section 1. The legislative power of the State shall be vested in the General Assembly consisting of a Senate and House of Representatives, both to be elected by the people, but the people reserve to themselves to propose laws and amendments to the Constitution and toenact and reject the same at the polls independent of the General Assembly

> also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the General Assembly.

An exception to the power of the referendum was made for "law necessary for the immediate preservation of the public peace, health or safety." As will be discussed, the Colorado General Assembly has routinely used this exception to avoid review of legislation by referendum by adopting a "safety clause" in each enactment. This organic act required that petitions be signed by qualified electors who must provide their residence addresses and the dates of signing. It also required the attachment of an affidavit of some qualified elector verifying the signatures.

While this section of the constitution was self-executing, the Colorado General Assembly has from time to time, legislated additional requirements. Thus, in 1913, the General Assembly enacted H.B.No.1 directing that each initiative and referendum petition bear a warning that it is a felony for anyone to sign with any name other than his or her own, or to knowingly sign more than one petition, or to sign when not a qualified elector. 1913 Colo. Sess. Laws 310. That act required that the signers must include the street and number of their residences; it repeated the provision for an attesting affidavit by a qualified elector; it established a format for petitions and it directed that each petition designate not less than three nor more than five representatives of the signers. Provision was made for a protest and a hearing on the sufficiency of the petition. The legislation also imposed requirements for the ballot title and publication of arguments for and against the measure.

In 1919, the Colorado General Assembly enacted S.B. No.141 establishing a procedure to fix a ballot title for

an initiated measure and limiting the time for circulation to six months from
the date that the title and submission clauses have been provided. 1919 Colo. Sess. Laws 436.

In 1941, the General Assembly enacted H.B. No.947. It prohibited the payment of money or other thing of value in consideration of or as an inducement to the circulation of any initiative or referendum petition" and established a criminal penalty for such conduct. 1941 Colo. Sess. Laws 480. That provision came before the Colorado Supreme Court in Urevich v. Woodward, 667 P.2d 760 (Colo. 1983), in the context of circulation of an initiative petition by ACORN, a non- profit organization whose circulators were to solicit financial contributions to the organization in exchange for payment to them of a percentageof the contributions they collected. The court narrowly construed the prohibiting language to avoid a conflict with Article V Section 1 of the Colorado Constitution and held that ACORN's method of petition circulation and solicitation of contributions did not violate the statute. In the opinion for the unanimous court, Justice Rovira noted the provision in Article II, Section 2 of the Colorado Constitution the people of the State of Colorado "have the sole and exclusive right of governing themselves" and observed that the reservation of the power to initiate legislation in Article V, Section 1 is a right of first order." After also noting that the Colorado Supreme Court had previously recognized the authority of the legislature to enact legislation regarding the exercising of this reserved power, he wrote:

> The balance between the legislative power of the general assembly and the legislative power of the people has been struck in favor of the people in the fundamental charter of

> our state. No statute passed by general assembly can be permitted to alter this allocation of power.

Id. at 762-3

Legislation changing those persons authorized to circulate petitions from qualified electors to registered voters was enacted in 1971. That statute was ruled unconstitutional in *Colorado Project-Common Cause v. Anderson,* 495 P.2d 220 (Colo. 1972) because it was inconsistent with Article V, Section 1. Chief Justice Pringle wrote the opinion for the unanimous court, saying:

> It is axiomatic that there are more citizens of this state who have the qualifications to register than there are those who actually register. The statutory requirement that the signing and circulating of petitions must be by *registered electors* rather than permitting *qualified electors* to carry on these functions is therefore a limitation not authorized by the constitution and is impermissible. *Id.* at 222.

The statutory prohibition of payment to circulators enacted in 1941 was challenged under Federal law in 1984. That statute was held to be a violation of the First and Fourteenth Amendments to the United States Constitution by the Tenth Circuit Court of Appeals in *Grant v. Meyer,* 828 F.2d 1446 (1 Oth Cir. 1987), affirmed by a unanimous opinion of the Supreme Court in *Meyer v. Grant,* 486 U.S. 414 (1988). *See* discussion *infra,* p.7.

The requirement that only registered electors could sign and circulate petitions was against imposed through an amendment an amendment to Article V, Section 1 of the

Colorado Constitution, pursuant to a referendum approved by Colorado voters. To be a registered a elector in Colorado, a person must be at least 18 years old, a citizen of the United States and a resident of Colorado for at least 25 days before an election. C.R.S. § 1-2-101 (Supp. 1994).

A significant change made by S.B. 93-135, is an amendment to C.R.S. 1-40-112(2) (Supp. 1994) adding a requirement that petition circulators wear identification badges as follows:

> (a)All circulators who are not to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "VOLUNTEER CIRCULATOR" in bold-faced type which is clearly legible and the circulator's name.
>
> (b)All circulators who are to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words "PAID CIRCULATOR" in bold-faced type which is clearly legible circulator's name, and the name and telephone number of the individual employing the circulator.

S.B. 93-135 also imposed reporting requirements on the proponents of a petition when paid circulators are used. C.R.S. § 1 -40-121 (Supp. 1994) provides, in relevant

> (1)The proponents of the petition shall file with the official who receives filings under the "Campaign Reform Act of 1974" for the election the name, address, and county of voter

> registration of all circulators who were paid to circulate any section of the petition, the amount paid per signture, and the total amount paid to each circulator. The filing shall be made at the same time the petition is filed with the designated election official. ...
>
> (2) The proponents of the petition shall sign and file monthly reports with the designated election official, due ten days after the last day of each month in which petitions are circulated on behalf of the proponents by paid circulators. Monthly reports shall set forth the following:
>
> (a) the names of the proponents;
> (b) the name and the residential and business addresses of each of the paid circulators;
> (c) the name of the proposed ballot measure for which petitions are being circulated by paid circulators; and
> (d) the amount of money paid and owed to each paid circulator for petition circulation during the month in question.

To obtain access to the ballot at general elections under the statutory and constitutional law in effect in Colorado at the time of trial, proponents of an initiated measure must submit a draft of the proposal to the State Legislative Council and the Legislative Legal Services Office for review and comment. C.R.S. § 1-40-105(1) (Supp. 1994). The draft then goes to the title board, which prepares a title, submission clause, and summary. C.R.S. § 1-40-106 (Supp. 1994). The title board's first meeting can be no earlier than the first Wednesday in December. C.R.S.

§ 1-40-106(1). No petition for an initiative measure can be circulated before the title, submission clause and summary have been fixed. C.R.S. § 1-40-108(1) (Supp. 1994). This process can be delayed by a motion for rehearing before the title board filed by any registered elector and the dispute can be taken to the Colorado Supreme Court. C.R.S. § 1 -40-1 07(2) (Supp. 1994). Petitions must be filed with the Secretary of State within six months after the title, submission clause and summary have been fixed. The number of petition signatures must be equal in number to at least five percent of the total number of persons voting for all candidates for the Office of Secretary of State in the previous general election. Colo. Const. Art. V, § 1 (Supp. 1994). The petitions must be filed with the Secretary of State at least three months prior to the election at which they are to be voted upon. *Id.*

THE UNITED STATES CONSTITUTION

In *Meyer v. Grant, 486* U.S. 414 (1988), the Supreme Court concluded that the circulation of an initiative petition involved interactive communication characterized as "core political speech" within the protection of the First Amendment, applicable to the states under the Fourteenth Amendment. The court identified the invalid aspects of the statutory prohibition of payment circulators in these words:

> The refusal to permit appellees to pay petition circulators restrict expression in two ways: First, it limits the number of voices convey appellees' message and the hours they can speak, and, therefore, limits the size of the audience they can reach. Second, it makes it likely that appellees will garner the number of signatures necessary to place the

> matter on the ballot, thus limiting their ability to make the the focus of statewide discussion. *Id.* at 422-423.

The burden of the state to justify such a restriction was described in the following paragraph:

> We agree with the Court of Appeals' conclusion that the statute trenches upon an area in which the importance of First Amendment protections is "at its zenith." For that reason, the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable. *Id.* at 425.

It is familiar learning that governmental infringements on political speech undergo strict scrutiny to determine if they are substantially related to a compelling governmental interest and are so narrowly drawn as to be the least restrictive means of furthering that interest. *Buckley v. Valeo,* 424 U.S. 1, 64 (1976); *NAACP v. Alabama,* 357 U.S. 449, 463 (1958).

The Supreme Court has not applied the strict scrutiny standard to all legislation affecting the right to vote and the freedom of association with others for political purposes. The state's interest in fair, honest and orderly elections has been recognized as a justification for some burdens on political liberty. In *Storer v. Brown,* 415 U.S. 724 (1974), Justice White wrote of the difficulty in establishing a rule of general application. In *Anderson v. Celebrezze,* 460 U.S. 780 (1983), an Ohio statute imposing an early filing deadline on independent candididates for President was invalidated by a divided court as an undue burden when balanced against the state's interests in voter education, political stability and equal

treatment with partisan candidates. In *Norman v. Reed,* 502 U.S. 279 (1992), the Court again divided over limitations on ballot access by a newly formed political party.

Justice White addressed the problem of articulating a test for constitutionality again in *Burdick v. Takushi,* 112 S.Ct. 2059 (1992), writing for the majority in affirming a prohibition of write-in candidates in Hawaii. There, he wrote:

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. See Brief for Petitioner 32-37.Accordingly, the mere fact that a State's system "creates barriers .. tending to limit the field of candidates from which voters might choose . .. does not of itself compel close scrutiny." *Bullock v. Carter,* 405 U.S. 134, 143 (1972); *Anderson, supra,* at 788; *McDonald v. Board of Election Comm'nrs of Chicago,* 394 U.S. 802 (1969).

Instead, as the full Court agreed in

Anderson, supra, at 788-789; *id.*, at 808, 817 (Rehnquist, J., dissenting), a more flexible standard applies. A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*, at 789; *Tashlian, supra,* at 213-214.

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed,* 502 U.S. , (1992). But when a state election law provision imposes only "re a nondiscriminatory restrictions" upon the First and Fourteenth Am rights of voters, "the State's important regulatory interests are e sufficient to justify" therestrictions. *Anderson, supra,* at 788; se at 788-789, n.9. We apply this standard in considering challenge to Hawaii's ban on write-in ballots.

The Tenth Circuit Court of Appeals recently concluded that the state's interest in voter education

supported a Kansas statute imposing a deadline for independent candidates to file nominating petitions which was characterized as a slight burden upon the rights of voters. *Hagelin for President Committee v. Graves,* 25 F.3d 956 (1Oth Cir. 1994).

Under the guidance of these cases, the analysis of the claims in this case must proceed by defining the character of the rights affected, the extent of the injury to those rights and then the nature and magnitude of the competing interests of the state.

THE PLAINTIFFS' CLAIMS

The plaintiffs have adequately demonstrated that compelling circulators to wear identification badges inhibits participation in the petitioning process. Jon Baraga recounted harassment that he personally experienced while circulating a hemp initiative petition and testified that the identification badge requirement made it more difficult to find circulators because of a fear of recrimination, retaliation and harassment. The plaintiff Hawkins testified that he found that potential circulators were not willing to wear personal identification badges required by this statute. The plaintiffs have shown that this requirement burdens core political speech. The strict scrutiny standard applies.

The defendant contends that the requirement is justified because it serves two compelling state interests: (1) The badges allow the public to identify the petition circulator in the event a complaint is filed; and, (2) the badges demonstrate to the public whether or not there is grassroots support for an initiative.

The defendant has presented some anecdotal evidence of circulators misrepresenting the effects of law changes proposed by their petitions and the inability of the these incidents because they could not identify those circulators. Assuming that such misstatements could be considered sufficient for prosecution, the state's these matters is insufficient under the strict scrutiny standard. Misstating the expected consequences of changes in the law is not uncommon in the political process. Inaccuraciesin political discourse do not necessarily rise to the level of calculated falsehood or criminal fraud. *See Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). The defendant's concern may use deliberate falsehoods to obtain signatures does not justify this burden on all circulators. The current criminal penalties for violations of the laws governing initiative petitions are sufficient to deter dishonest circulators. C.R.S. § 1-40-130 (Supp. 1994). Therefore, the state's interest in honesty in public discussion of governmental issues as to warrant the identification of those who choose to speak in support of a prohibition of anonymous distribution of campaign literature was ruled invalid in *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987). There, the Court relied on *Talley v. California*, 362 U.S. 60 (1960), voiding an ordinance banning all anonymous handbills. The Court recognized the historical importance of anonymity in political speech under certain circumstances of controversy generated by such initiatives as the Hemp Initiative present such circumstances.

The relationship of the badges to the demonstration of grassroots support is not made on the record. Here, as in *Grant v. Meyer*, the State's interest in a demonstration of sufficient support is met by the requirement of a percentage of the votes cast in the previous election for Secretary of State. *Grant v. Meyer, supra*, 828 F.2d at 1455. The badge identification requirement substantially affects the number of potential circulators which translates into a corresponding decrease in the amount of protected political speech. Th interests are not compelling and the restriction has not been narrowly

drawn to further those interests. Accordingly, the badge requirement is a violation of the F Amendments and is therefore unconstitutional.

S.B. 93-135 requires that circulators be registered electors who are eligible to vote on the measure which is the subject of the petition. It also requires the circulators to be at least 18 years of age at the time of the circulation. C.R.S. § 1-40-112(1) (Supp. 1994). Nothing in the record suggests any statewide ballot issues as to which the qualifying phrase "who are eligible to vote on the measure" would be a restriction beyond the requirement of registration. The record does show that the requirement of registration limits the number of persons available to circulate and sign these petitions and, accordingly, restricts core political speech. However, the source of this requirement is not S.B. 93-135; it is the constitutional amendment adopoted by the people in 1980. There is nothing in the United States Constitution that requires that any state provide for the initiative or referendum. The people are the source of the power and they may exercise their sovereign authority to limit the scope of that power so long as there is no discriminatory classification. The Colorado electorate chose to restrict participation in the petitioning process to registered electors. This decision is not subject to any level of scrutiny by this court in the contex: of this case.

The claim of the minor plaintiff, William David Orr, that because he is under 18 years of age he is eliminated from participation in political speech as a circulator is answered by this restriction to registered electors. As previously noted, qualified voters in Colorado must be at least 18 years old, and the requirement of being a qualified elector goes back to the original provision for the initiative

made in the constitutional amendment adopted in 1910. There is, therefore, no need to justify the age requirement as a separate limitation.

The report required by the provision in S.B. 93-135, codified at C.R.S. §1-40-121(1) (Supp. 1994), is an extension of the requirements contained in the Colorado Campaign Reform Act of 1974, C.R.S. § 1-45-101, *et seq.* The Campaign Reform Act requires political committees supporting or opposing a statewide issue to file a statement of organization with the state and requires the filing by the campaign treasurer of reports of all contributions received and expenditures made by or on behalf of such a political committee. C.R.S. Sec.s 1-45-106 & 108 (Supp. 1994). These reports must be submitted 11 days before and 30 days after the election. *Id.* S.B. 93-135 added a requirement that proponents of a petition, at the time of filing, must disclose the names, addresses and county of voter registration of all circulators paid to circulate any section of the petition together with the amount paid for each signature and the total amount paid to each circulator. C.R.S. § 1-40-121(1) (Supp. 1994). This requirement of the circulators and thus exposes them to intimidation, harassment and retribution in the same manner as the badge requirement.

The legislative history shown in the record and the evidence presented at the trial show that since *Meyer v. Grant* the circulation of initiative petitions has become a business and the proponents of several petitions, particularly those seeking authorized gambling, have hired contractors to do the circulation.

Given the business of circulation for hire, there is an interest in compelling disclosure by the proponents of the

persons or entities being hired, not only to prevent fraud but to give the public information concerning who the principal proponents are and what kind of financial may be available to them. What may appear to be grassroots support might in actuality be well financed special interests with hidden agenda. That legitimate interes, however, it is not significantly advanced by disclosure of the names and addresses of each person paid to circulate any section of the petition. What is of interest is the payor, not the payees.

The final report is a ballot access requirement. It serves the same purposes as the Campaign Reform Act -- the prevention of fraud and the education of the electorate as to the source of support for the measure submitted through this process. Upon elimnation of the provision requiring identification of the circulators, the burden on the proponents is slight. This requirement, as modified, is valid.

The statute also requires petition proponents to file monthly reports on paid circulators. C.R.S. § 1-40-121(2) (Supp. 1994). As noted above, to the extent the monthly report requirement includes the name and residential and business addresses of each of the paid circulators, it is constitutionally invalid. The other requirements of the monthly reports are the names of the proponents, the name of the proposed ballot measure for which petitions are being circulated by paid circulators and the amount of money paid and owed to each paid circulator for petition circulation during the month in question. Preparation of the monthly reports is burdensome and involves an additional expense to those supporting an initiative or referendum petition. The testimony presented shows that the monthly reports affect the circulation process and therefore the amount of core political speech. The state has failed to demonstrate how the

monthly reports meet the stated objectives of preventing fraud as compared with the final report to be filed when the petitions are submitted to the designated election official. The monthly reports are restrictions on core political speech and are invalid.

The plaintiffs assert and have presented evidence to support their contention that the requirement that the petitions be circulated within a six month period, C.R.S. Sec. 1-40-108(1) (Supp. 1994), is an undue restriction on core political speech. While it does, indeed, affect the quantity of such speech, the primary purpose is the preparation of an orderly ballot.The defendant has presented evidence of successful circulations and there have been many iniated measures on the election ballots in Colorado as demonstrated in defendants' Exhibits H and I. Testimony of witnesses who successfully placed measures on the ballot shows that with planning and a proper preparation of the ballot title, there are at least four months for active solicitation of signatures and that has been adequate. Viewing this issue as a ballot access measure and considering the importance of fixing a proper title for the legitimate objective of voter education and fairness, the court finds and concludes that the six month limitation is not an unreasonable burden on the rights of either the proponents of the petition or of the voting public.

The plaintiffs have made a general challenge to the requirement of an affidavit by the circulators enacted in S.B. 93-135 and now appearing in the code as 1 -40-111(2) (Supp. 1994) which provides as follows:

> (2)To each petition section shall be attached a signed, notarized and dated affidavit executed

by the registered elector who circulated the petition section, which shall include his or her printed name, the address at which he or she resides, including the street name and number, the city or town, the county, and the date he or she signed the affidavit; that he or she has read and understands the laws governing the circulation of petitions; that he or she was a registered elector at the time the section of the petition was circulated and signed by the listed electors; that he or she circulated the section of the petition; that each signature thereon was affixed in the circulator's presence; that each signature theron is the signature of the person whose name it purports to be; that to the best of the circulator's knowledge and belief each of the persons signing petition section was, at the time of signing, a registered elector; and that he or she has not paid or will not in the future pay and that he or she believes that no other person has so paid or will pay, directly or indirectly, any money or other thing of value to any signer for the purpose of inducing or causing such signer to affix his or her signature to the petition.

This is a recognition of the central function of the circulator in preventing fraud and insuring accuracy in the petition signing process. The requirement that the attesting circulator include his or her name and residential address raises the same concerns as the monthly reports by the proponents and to some extent the identification badge requirement that. The difference is that the affidavit requirement has the primary purpose of providing the

opportunity for an adequate hearing on the sufficiency of the signatures and for other matters for the petition relevant to placing the measure on the ballot. Here, then, the identification must be conisdered in terms of the state's power to regulate ballot access. There is a compelling necessity to be able to summon circulators to provide testimony at a hearing on challenges to the validity of the signatures and for other matters relevant to the petitioning process.

There is a qualitative difference between requiring name and residence identification on an affidavit for the sections of the petition circulated by the identified individual and the inclusion of his or her name and address in monthly reports or on badges displayed on the street. That difference is a matter of access. Those who may seek this identifying in purposes as retaliation or harassment will have considerably greater difficulty in finding these names and addresses in the masses of papers filed with the petitions as compared with the monthly reports and the identification badges. Even assuming a strict scrutiny standard, the court finds that the state's compelling need for the names and addresses of the circulators is justified and this requirement is sufficiently narrowd,y drawn to be constitutional.

The plaintiffs also argue that the circulator affidavit requirement, as it is reiterated § 1-40-116(1) (Supp. 1994), is unconstitutionally vague because it requires circulators to aver, without personal knowledge, that all circulators have complied with C.R.S Sec. 1-40-101 et seq. While not artfully drafted, this section is not unconstitutionally vague. The general references to circulator affidavits in § 1-40-116 is controlled by the specific affidavit requirements 1-40-111(2), *supra*. *See* C.R.S. § 2-4-205 (1980 Repl. Vol.1B). Section 1-40-111(2) simply requires that the circulator attest that he or she has circulated a sectio of the

petition in compliance with the initiative statute. The statute does not require each circulator to attest to the validity of the other circulators' sections of the petition.

The plaintiffs have contended that the Ninth Amendment to the United States Constitution has been violated by these limitations on the reserved power of the initiative and referendum. That amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

That broad language has seldom been used by the courts as a basis for invaldiating legislation. It is not applicable here because the rights enumerated by the First and Fourteenth Amendments are adequate to the determination of the issues presented in this case.

As previously noted, the Colorado General Assembly has routinely used a "safety clause," providing that its legislative enactments are necessary for the immediate preservation of peace, health and safety to avoid a petition for a referendum and the inclusion of such a clause in S.B. 93-135 prevented a referendum on it. This court previously denied the plaintiffs' motion for a preliminary injunction based on a claim of invalidity of that legislative statement. In part, that decision rested on the conclusion that the plaintiffs were free under thr initiative power to propose any measure by petition. They could have initiated a repeal of S.B. 93-135. There is a more fundamental reason to reject the request that this court invalidate a legislative enactment. It is the doctrine of separation of powers. No matter how routinely the General

Assembly may attach such clauses in legislative measures, before any court can invalidate that provision in any particular bill, that court must make a determination that the particular legislation could not possibly have any relevance to the immediate preservation of the public peace, health or safety. That is a political question which no court is empowered to answer. The safety clause in S.B. 93-135 was a valid provision in that legislation.

Upon the foregoing, it is

ORDERED that judgment will enter declaring that the following provisions of the Colorado Revised Statutes are invalid because they are in violation of the First and Fourteenth Amendments to the United States Constitution, and ordering that the defendant Secretary of State of the State of Colorado is permanently enjoined from enforcing those provisions: C.R.S. § 1-40-121(1) (Supp. 1994) to the extent that it requires the proponents of a petition initiative or referendum to provide "the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition" and the names of circulators in reporting the amounts paid to circulators; C.R.S. Sec. 1-40-121 (2) (Supp. 1994) in its entirety, and C.R.S. Sec. 1-40-112(2) (Supp. 1994) in its entirety. All other claims of the plaintiffs shall be dismissed. The plaintiffs shall have to and including December 5,1994, within which to file any claim for attorney's fees under 42 U.S.C. § 1988.

Dated:
November 23, 1994

BY THE COURT:
names of circulators

SENATE BILL 93-135

BY SENATORS Wattenberg, Johnson, and Casey; also REPRESENTATIVES Fleming, Allen, Armstrong, Hagedorn, R. Hernandez, Kerns, Knox, Kreutz, Reeser, Schauer, and Tanner.

CONCERNING BALLOT ISSUES PROPOSED PURSUANT TO THE INITIATIVE AND REFERENDUM PROCESS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Article 40 of title 1, Colorado Revised Statutes, 1980 Repl. Vol., as amended by House Bill 93-1155, enacted at the First Regular session of the Fifty-ninth General Assembly, is amended, WITH THE RELOCATION OF PROVISIONS, to read:

1-40-108. (Formerly 1-40-104] Petition - time of fiing -fees. (1) No petition for any STATEWIDE initiative law or amendment to the state constitution shall be of any effect unless filed with the secretary of state within six months from the date that the titles, submission clause, and summary ~~thefor~~ have been fixed and determined pursuant to the provisions of ~~section 1-40-101~~ SECTIONS 1-40-106 AND

1-40-107 and unless filed with the secretary of state ~~at least three months~~ WITHIN THE TIME REQUIRED BY THE STATE CONSTITUTION before the election at which it is to be voted upon. All filings under this section must be made by 3 p.m.
on the day of filing.

1-40-111. [Formerly 1-40-106 (2)] Signatures - affidavits.

~~(b)~~ (2) To each petition section shall be attached a signed, notarized, and dated affidavit executed by the registered elector who circulated ~~said~~ THE petition section, which shall, include his OR HER printed name, the address at which he OR SHE resides, including the street name and number, the city or town, ~~and~~ the county, AND the date he OR SHE signed the affidavit; THAT HE OR SHE HAS READ AND UNDERSTANDS THE LAWS GOVERNING THE CIRCULATION OF PETITIONS; that he OR SHE was a registered elector at the time the section of the petition was circulated and signed by the listed electors; that he OR SHE circulated the ~~said~~ section of the petition; that each signature thereon was affixed in ~~his~~ THE CIRCULATOR'S presence; that each signature thereon is the signature of the person whose name it purports to be; that to the best of ~~his~~ THE CIRCULATOR'S knowledge and belief each of the persons signing ~~said~~ THE petition section was, at the time of signing, a registered elector; and that he OR SHE has not paid or will not in the future pay and that he OR SHE believes other no other person has so paid or will pay, directly or indirect money or other thing of value to any signer for the purpose of inducing or causing such signer to affix his OR HER signature to ~~such~~ THE petition. The ~~secretary of state~~ DESIGNATED ELECTION OFFICIAL shall not accept for filing any section

of a petition which does not have attached thereto the notarized affidavit required by this section. Any signature added to a section of a petition after the ~~said~~ affidavit has been executed shall be invalid.

1-40-112.[Formerly 1-40-106 (3)] Circulators - requirements. ~~(3)~~ (1) No section of a petition for any iniative or referendum measure shall be circulated by any person who is not a registered elector AND AT LEAST EIGHTEEN YEARS OF AGE at the time ~~said~~ THE section is circulated.

(2) (a) ALL CIRCULATORS WHO ARE NOT TO BE PAID FOR CIRCULATING PETITIONS CONCERNING BALLOT ISSUES SHALL DISPLAY AN IDENTIFICATION BADGE THAT INCLUDES THE WORDS "VOLUNTEER CIRCULATOR" IN BOLD-FACED TYPE WHICH IS CLEARLY LEGIBLE AND THE CIRCULATOR'S NAME.

(b) ALL CIRCULATORS WHO ARE TO BE PAID FOR CIRCULATING PETITIONS CONCERNING BALLOT ISSUES SHALL DISPLAY AN IDENTIFICATION BADGE THAT INCLUDES THE WORDS "PAID CIRCULATOR" IN BOLD-FACED TYPE WHICH IS CLEARLY LEGIBLE, THE CIRCULATOR'S NAME, AND THE NAME AND TELEPHONE NUMBER OF THE INDIVIDUAL EMPLOYING THE CIRCULCULATOR

1-40-121. [Formerly 1-40-110]

(2) THE PROPONENTS OF THE PETITION SHALL SIGN AND FILE MONTHLY REPORTS WITH THE DESIGNATED ELECTION OFFICIAL, DUE TEN

DAYS AFTER THE LAST DAY OF EACH MONTH IN WHICH PETITIONS ARE CIRCULATED ON BEHALF OF THE PROPONENTS BY PAID CIRCULATORS MONTHLY REPORTS SHALL SET FORTH THE FOLLOWING:

(a) THE NAMES OF THE PROPONENTS;

(b) THE NAME AND THE RESIDENTIAL AND BUSINESS ADDRESSES OF EACH OF THE PAID CIRCULATORS;

(c) THE NAME OF THE PROPOSED BALLOT MEASURE FOR WHICH PETITIONS ARE BEING CIRCULATED BY PAID CIRCULATORS; AND

(d) THE AMOUNT OF MONEY PAID AND OWED TO EACH CIRCULATOR FOR PETITION CIRCULATION DURING THE MONTH IN QUESTION.

1-40-130. [Formerly 1-40-118] Unlawful acts - penalty.

(1) ~~Every person who is a registered elector may sign a petition~~.

~~(2)~~ It is unlawful:

(a) For any person willfully and knowingly to circulate or cause to be circulated or sign or procure to be signed any petition bearing the name, device, or motto of any person, organization, association, league, or political party, or purporting in any way to be endorsed, approved, or submitted by any person, organization, association, league, or political party, without the written consent, approval and authorization of ~~such~~ THE person, organization, association,

league, or political party;

(b) For any person to sign any name other than his OR HER own to any petition or knowingly to sign his OR HER name more than once for the same measure at one election;

(c) For any person to knowingly sign any petition who is not a registered elector at the time of signing the same;

(d) For any person to sign any affidavit as circulator without knowing or reasonably believing the statements made in ~~such~~ THE affidavit to be true;

(e) For any person to certify that an affidavit attached to a petition was subscribed or sworn to before him OR HER unless it was so subscribed and sworn to before him OR HER and unless ~~such~~ THE person so certifying is duly qualified under the laws of this state to administer an oath;

(f) For any officer or person to do willfully, or with another or others conspire, or agree, or confederate to do, any act which hinders, delays, or in any way interferes with the calling, holding, or conducting of any election permitted under the initiative and referendum powers reserved by the people section 1 of article V of the state constitution or with the registering of electors therefor;

(g) For any officer to do willfully any act which shall confuse or tend to confuse the issues submitted or proposed to be submitted at any election, or refuse to submit any petition in the form presented for submission at any election;

(h) For any officer or person to violate willfully any provision of this article.

~~(3)~~ (2) Any person, upon conviciton of a violation of any provision of this section, shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than one year in the county jail, or by both such fine and imprisonment.

SECTION II. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

s/Tom Norton
President of the Senate

s/ Charles E. Berry
Speaker of the House of Representatives

s/ Joan M. Albi
Secretary of the Senate

s/ Lee C. Bahrych
Chief Clerk of the House of Representatives

Approved: Became law May 4, 1993 at 12:01 a.m.

Roy Romer
Governor of the State of Colorado

18-1-801. Insufficient age. The responsibility of a person for his conduct is the same for persons between the ages of ten and eighteen as it is for persons over eighteen except to the extent that responsibility is modified by the provisions of the "Colorado Children's Code", title 19, C.R.S. No child under ten years of age shall be found guilty of any offense.

Source: L 71: R & RE p.412, §1. C.R.S.1963: § 40-1-901. **Am. Jur.2d.** See 21 Am. Jur.2d. Criminal Law, C.J.S. See 22 C.J.S., Criminal Law, § 96. 43 § § 37.38. C.J.S. Infants, § 97

19-2-102. Legislative declaration. The general assembly hereby finds that the intent of this article is to protect and improve the public safety by creating a system of juvenile justice that will appropriately sanction juveniles who violate the law. The general assembly further finds that, while holding paramount the public safety, the juvenile justice system shall take into consideration the best interests of the juvenile in providing appropriate treatment to reduce the rate of recidivism in the juvenile justice system and t assist the juvenile in becoming a productive member of society.

Source: L 96 Entire article amended with relocations, p. 1595, § 1, effective January 1, 1997.

19-2-104. Jurisdiction. (l) Except as otherwise provided by law, the juvenile court shall have exclusive original jurisdiction in proceedings:

(a) Concerning any juvenile ten years of age or older who has violated:

(I) Any federal or state law, except nonfelony state traffic, game and fish, and parks and recreation laws or regulations, the offenses specified in section l 8-l 3-l 2 l, C. R.S., concerning tobacco products, the offense specified in section 18-13-122, C.R.S., Concerning the illegal possession or consumption of ethyl alcohol by an underage person, and the offenses specified in section 18-18-406 (l) and (3). C.R.S. concerning marihuana and marihuana concentrate; h

(II) Any county or municipal ordinance except traffic ordinances, the penal y for which may be a jail sentence of more than ten days; or

(III) Any lawful order of the court made under this title;

(b) Concerning any juvenile to which section l 9-2-5 l 8 applies; except that, after filing charges in the juvenile court but prior to the time that the juvenile court conducts a transfer hearing, the district attorney may file the same or different charges against the juvenile by direct filing of an information in the district court or by indictment pursuant to section 19-2-517. Upon said filing or indictment in the district court, the juvenile court shall no longer have jurisdiction over proceedings concerning said charges.

(2) The juvenile court shall have limited jurisdiction in matters to which section l 9-2-5 l 7 applies

(3) The 'act that a juvenile has been prosecuted or convicted in the county court for a nonfelony violation under title 42, C.R.S., shall not be a bar to a subsequent or parallel proceeding under this title for delinquent acts arising out of the same criminal episode; nor shall proceedings under this title be a bar to a subsequent or parallel prosecution in the county court for a nonfelony violation under title 42, C.R.S. for the same delinquent acts arising from the same criminal episode.

(4) Notwithstanding any other provision of this section to the contrary, the juvenile court may exercise jurisdiction over a juvenile who is under sixteen years of age and who has violated a traffic law or ordinance if his or her case is transferred to the juvenile court from the county court. Such a transfer shall be subject to approval by the juvenile court.

(5) Notwithstanding any other provision of this section to the contrary, the juvenile court and the county court shall have concurrent jurisdiction over a juvenile - who is under the county court shall have concurrent jurisdiction over a juvenile who is under eighteen years of age and who is charged with a violation of section 18-13-122,, C.R.S., or section l 8- l 8-406 (l) or (3), C.R.S.; except that, if the

juvenile court accepts jurisdiction over such a juvenile, the county court jurisdiction shall terminate.

(6) The juvenile court may retain jurisdiction over a juvenile until all orders have been fully complied with by such person, or any pending cases have been completed, or the statute of limitations applicable to any offense that may be charged has run, regardless of whether such person has attained the age of eighteen years, and regardless of the age of such person.

(7) This section shall not be construed to confer any jurisdiction upon the court over a person for any offense committed after the person attains the age of eighteen years.

Source: L. 96: Entire article amended with relocations, p.1596, § 1, effective January 1, 1997.

May 17, 1993

Bill Orr, Executive Director
American Constitutional Law Foundation, Inc.
601 S. Broadway, Suite U
Denver, Co 80209

Re: Referral of SB 135 Dear Mr. Orr:

The safety clause on SB 135 does prevent your referenda petition under Article V, Sect. 1. Therefore, your second question is moot.

Sincerely,

s/Natalie Meyer